(3)

Supreme Court, U.S.
FILED
MAR 20 2000
CLERK

No. 99-781

IN THE

Supreme Court of the United States

AVIS RENT A CAR SYSTEM, INC., *et al.*,
Petitioners,

vs.

OSCAR AGUILAR, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

BRIEF IN OPPOSITION

Patricia A. Shiu
Counsel of Record
Claudia Center
THE EMPLOYMENT LAW CENTER,
A PROJECT OF THE LEGAL AID SOCIETY
OF SAN FRANCISCO
1663 Mission Street, Suite 400
San Francisco, California 94103
(415) 864-8848

Attorneys for Respondents
OSCAR AGUILAR, *et al.*

11 pp

QUESTION PRESENTED FOR REVIEW

Whether the First Amendment to the United States Constitution permits a trial court to issue a remedial injunction prohibiting the continued use of racial epithets in the workplace where there has been a judicial determination that a manager's use of such epithets has created and will contribute to the continuation of a hostile or abusive work environment and therefore constitute employment discrimination?

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

LIST OF APPENDICES iv

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

I. The Record In This Case Is Wholly Inadequate And Does Not Deserve This Court's Review. 2

II. The Petitioners Have Conceded That The Jury's Findings Of Liability Are Supported By Substantial Evidence. 4

III. The Jury's Verdict. 5

IV. The Court's Factual Findings And Remedial Order. 6

V. The Petitioners May Not Augment The Inadequate Record With Appendix E. 9

ARGUMENT 10

I. This Case Is Not Appropriate For Review By The Supreme Court. 10

A. The Petitioners Challenge The Trial Court's Findings Of Fact, But Fail To Produce Any Record Evidence To Contest These Findings. 10

B. There Is No Conflict Among The Courts As To The Constitutionality Of An Injunctive Remedy For Unlawful Harassment In Employment. 13

C. The California Supreme Court's Ruling Is Consistent With Governing Supreme Court Case Law. 15

II. The Challenged Injunction Is Not An Unconstitutional Prior Restraint. 18

A. Injunctive Remedies Do Not Constitute Illegal "Prior Restraints" When They Are Issued After A Full And Fair Trial On The Merits In Which The "Speech" Was Judicially Found To Constitute A Crime Or A Tort. 19

B. The California Supreme Court's Decision Does Not Alter First Amendment Jurisprudence. 23

III. Injunctive Relief Is an Essential Remedy To Ensure That Racial Discrimination Ceases. 26

IV. The State Has A Compelling Interest In Remedying And Deterring Unlawful Employment Discrimination And Harassment. 29

CONCLUSION 30

LIST OF APPENDICES

Appendix A
Reporter's Transcript of Proceedings,
Post-Trial Motions,
In the Superior Court of the State of California,
for the County of San Francisco,
Argued December 15, 1994

Appendix B
Reporter's Transcript of Proceedings,
Post Trial Motions,
In the Superior Court of the State of California,
for the County of San Francisco,
Argued February 6, 1995

TABLE OF AUTHORITIES

Cases — Page(s)

Advanced Training Sys., Inc. v. Caswell Equip. Co.,
352 N.W. 2d 1 (Minn. 1984) 25, 26

Aguilar v. Avis Rent A Car System, Inc.,
21 Cal. 4th 121 (1999) ..... *passim*

Aguilar v. Avis Rent A Car System, Inc.,
50 Cal. App. 4th 28 (1996) 3, 8, 9

Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975) 26

Amirmokri v. Baltimore Gas & Elec. Co.,
60 F.3d 1126 (4th Cir. 1995) 27

Anderson v. Dean,
354 F. Supp. 639 (N.D. Ga. 1973) 25

Arizona Governing Committee v. Norris,
463 U.S. 1073 (1983) 27

Auburn Police Union v. Carpenter,
8 F.3d 886 (1st Cir 1993) 19, 20, 25

Bantam Books v. Sullivan,
372 U.S. 58 (1963) 22

Bateman Eichler, Hill Richards, Inc. v. Berner,
472 U.S. 299 (1985) 24

Bethel School Dist. v. Fraser,
478 U.S. 675 (1986) 18

Bob Jones University v. United States,
461 U.S. 574 (1983) 30

Bouman v. Block,
940 F.2d 1211 (9th Cir. 1991),
cert. denied, 502 U.S. 1005 (1991) 27

Brandenburg v. Ohio,
395 U.S. 444 (1969) 23

Brown v. Superior Court,
37 Cal. 3d 477 (1984) 27

Brown v. Trustees of Boston Univ.,
891 F.2d 337 (1st Cir. 1989),
cert. denied, 496 U.S. 937 (1990) 28

Burlington Industries v. Ellerth,
524 U.S. 742 (1998) 15, 24

Cantrell v. Forest City Publishing Co.,
419 U.S. 245 (1974) 24

Carrisales v. Dep't of Corrections,
21 Cal. 4th 1132 (1999) 12

Castrol, Inc. v. Pennzoil Co.,
987 F.2d 939 (3d Cir. 1993) 25

Chaplinsky v. New Hampshire,
315 U.S. 568 (1942) 21, 23

Cohen v. California,
403 U.S. 15 (1971) 17, 18

Collin v. Smith,
578 F.2d 1197 (7th Cir. 1978) 22, 23

Commodore Home, Inc. v. Superior Court,
32 Cal. 3d 211 (1982) 17, 28, 29

DeAngelis v. El Paso Mun. Police Officers Ass'n,
51 F.3d 591 (5th Cir. 1995),
cert. denied, 516 U.S. 974 (1995) 14

DeCanas v. Bica,
424 U.S. 351 (1976) 30

Doe v. University of Michigan,
721 F. Supp 852 (E.D. Mich. 1989) 23

Dombeck v. Milwaukee Valve Co.,
40 F.3d 230 (7th Cir. 1994) 28

E.E.O.C. v. Beverage Canners,
897 F.2d 1067 (11th Cir. 1990) 28

E.E.O.C. v. Gurnee Inn Corp.,
914 F.2d 815 (7th Cir. 1990) 28

E.E.O.C. v. Hacienda Hotel,
881 F.2d 1504 (9th Cir. 1989) 27, 28

E.E.O.C. v. Northwest Airlines, Inc.,
188 F.3d 695 (6th Cir. 1999) 28

E & J Gallo Winery v. Gallo Cattle Co.,
967 F.2d 1280 (9th Cir. 1992) 25

Faragher v. City of Boca Raton,
524 U.S. 775 (1998) 15, 24

First National Bank of North East v. Fockler,
649 F.2d 213 (4th Cir. 1981) 9

Frisby v. Schultz,
487 U.S. 474 (1988)..... 18

F.T.C. v. Superior Court Trial Lawyers' Assoc.,
493 U.S. 411 (1990)..... 24

Gantt v. Sentry Insurance,
1 Cal. 4th 1083 (1992)..... 29

General Talking Pictures Corp. v. Western Electric Co.,
304 U.S. 175 (1938)..... 10

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974)..... 23

Gooding v. Wilson,
405 U.S. 518 (1972)..... 23

Harper & Row, Publishers, Inc. v. Nation Enterprises,
471 U.S. 539 (1985)..... 23

Harris v. Forklift Systems, Inc.,
510 U.S. 17 (1993)..... 15, 16, 24

Hess v. Indiana,
414 U.S. 105 (1973)..... 23

Hishon v. King & Spalding,
467 U.S. 69 (1984)..... 21

Hurley v. Irish American Gay, Lesbian,
and Bisexual Group of Boston,
515 U.S. 557 (1995)..... 3

Ibanez v. Florida Dep't of Bus. & Prof'l Reg.,
512 U.S. 136 (1994)..... 24

In re R.M.J.,
455 U.S. 191 (1982)..... 24

Jones v. Flagship Int'l,
793 F.2d 714 (5th Cir. 1986)..... 15

Kewanee Oil Co. v. Bicron Corp.,
416 U.S. 470 (1974)..... 24

Kingsley Books, Inc. v. Brown,
354 U.S. 436 (1957)..... 21, 22, 23, 25

Kramer v. Thompson,
947 F.2d 666 (3d Cir. 1991)..... 25

Lehman v. Shaker Heights,
418 U.S. 298 (1974)..... 18

Lothschuetz v. Carpenter,
898 F.2d 1200 (6th Cir. 1990)..... 25

Madsen v. Women's Health Center, Inc.,
512 U.S. 753 (1994)..... 3, 4

Maryland v. Baltimore Radio Show, Inc.,
338 U.S. 912 (1950)..... 11

Maryland Casualty Co. v. Jones,
279 U.S. 792 (1929)..... 9

McKennon v. Nashville Banner Publ'g Co.,
513 U.S. 352 (1995)..... 26, 27

Meritor Savings Bank FSB v. Vinson,
477 U.S. 57 (1986)..... 15, 16, 24

Miller v. California,
413 U.S. 15 (1973)..... 23

Near v. Minnesota,
283 U.S. 697 (1931)..... 21, 22

Nebraska Press Ass'n v. Stuart,
427 U.S. 539 (1976)..... 22

New York Times v. Sullivan,
376 U.S. 254 (1964)..... 23

N.L.R.B. v. Gissel Packing Co.,
395 U.S. 575 (1969)..... 16, 17

O'Brien v. University Community Tenants Union, Inc.,
327 N.E.2d 753 (Ohio 1975)..... 25

Organization for a Better Austin v. Keefe,
402 U.S. 415 (1971)..... 24, 25

Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.,
469 U.S. 189 (1985)..... 24

Peatros v. Bank of America,
22 Cal. 4th 147 (2000) 30

Pittsburgh Press Co. v. Pittsburgh Com'n on Human Relations,
413 U.S. 376 (1973)..... *passim*

Railway Mail Ass'n v. Corsi,
326 U.S. 88 (1945)..... 30

R.A.V. v. City of St. Paul,
505 U.S. 377 (1992)..... 17, 25

Reno v. Baird,
18 Cal. 4th 640 (1998) 12

Retail Credit Co. v. Russell,
218 S.E.2d 54 (Ga. 1975)..... 25

Rice v. Sioux City Memorial Park Cemetery, Inc.,
349 U.S. 70 (1955)..... 15

Roberts v. United States Jaycees,
468 U.S. 609 (1984)..... 20

Rojo v. Kliger,
52 Cal. 3d 65 (1990) 29

Rosenberger v. Rector and Visitors of Univ. of Va.,
515 U.S. 819 (1995)..... 22

Roth v. United States,
354 U.S. 476 (1957)..... 23

Rowan v. United States Post Office,
397 U.S. 728 (1970)..... 18

Ruffin v. Great Dane Trailers,
969 F.2d 989 (11th Cir. 1992),
cert. denied, 507 U.S. 910 (1993) 28

San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.,
483 U.S. 522 (1987)..... 24

S.E.C. v. Capital Gains Research Bureau, Inc.,
375 U.S. 180 (1963)..... 24

S.E.C. v. Wall Street Publ'g Inst.,
851 F.2d 365 (D.C. Cir. 1988) 25

Skidmore v. Precision Printing & Packaging,
188 F.3d 606 (5th Cir. 1999)..... 15

Snell v. Suffolk County,
782 F.2d 1094 (2d Cir. 1986) 28

Southeastern Promotions, Ltd. v. Conrad,
420 U.S. 546 (1975) 22

Spence v. Washington,
418 U.S. 405 (1974) 17

Time, Inc. v. Firestone,
424 U.S. 448 (1976) 23

Time, Inc. v. Hill,
385 U.S. 374 (1967) 24

Transgo, Inc. v. AJAC Transmission Parts Corp.,
768 F.2d 1001 (9th Cir. 1985),
cert. denied, 474 U.S. 1059 (1986) 25

United States v. Moore,
571 F.2d 76 (2d Cir. 1978) 9

United States v. Oregon State Med. Soc'y,
343 U.S. 326 (1952) 11

United States v. W.T. Grant Co.,
345 U.S. 629 (1953) 11

Watts v. Kroger Co.,
170 F.3d 505 (5th Cir. 1999) 15

Watts v. United States,
394 U.S. 705 (1969) 23

Wisconsin v. Mitchell,
508 U.S. 476 (1993) 17

Zacchini v. Scripps-Howard Broad. Co.,
433 U.S. 562 (1977) 23

Statutory Materials ..... Page(s)

First Amendment to the Constitution
of the United States ..... *passim*

15 U.S.C. § 1116(a) 24

17 U.S.C. § 502 23

42 U.S.C. § 2000e *et seq.* ..... *passim*

42 U.S.C. § 2000e-5(g)(1) 26

Sup. Ct. R. 10 10

118 Cong. Rec. 7168 (1972) 26

S.E.C. Rule 10b-5(b) 24

Cal. Constitution, Art. I, section 8 29

California Fair Employment & Housing Act,
Cal. Gov't Code § 12900 *et seq.* ..... *passim*
Cal. Gov't Code § 12920.5 26
Cal. Gov't Code § 12940(h) 24
Cal. Gov't Code § 12965(c)(3) 26

Other Materials.

Redish, Martin H., *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*,
70 Va. L. Rev. 53 (1984) ..... *passim*

STATEMENT OF THE CASE

The California Supreme Court held that a remedial injunction prohibiting the continued use of racial epithets in the workplace does not violate the right to free speech where there has been a judicial determination that the use of such epithets will contribute to the already existing hostile or abusive work environment. *Aguilar v. Avis Rent A Car System, Inc.*, 21 Cal.4th 121, 140-41 (1999). The Court properly held that speech, which might otherwise be protected, finds no refuge in the Constitution where such speech has been found to violate California's Fair Employment and Housing Act (FEHA), Cal. Gov't Code § 12900 *et* seq. This ruling correctly reconciled the FEHA's remedial purpose to both prevent and deter unlawful employment practices in the workplace with the First Amendment's goal of protecting public dialogue in the marketplace of ideas.

Harassing conduct is not automatically cloaked with constitutional protection because the harassment takes the form of speech. If the promise of a discrimination-free workplace has any meaning, then verbal harassment that has been judicially determined to violate the FEHA must be remedied. Indeed, the petitioners do not challenge whether the First Amendment permits the imposition of civil liability for past instances of pure speech that create a hostile work environment. *Aguilar,* 21 Cal.4th at 131.

Under these facts, there is no violation of the First Amendment. After a ten-week trial, the jury found that the barrage of racist invective to which these Latino employees were subject constitutes unlawful discrimination. This invective was part of an overall course of conduct which violated the law precisely because it was so severe and pervasive that it altered the conditions of plaintiffs' employment. The trial court entered a remedial injunction because it expressly found that there was a "substantial

likelihood" that John Lawrence, if left unrestrained, would simply continue to engage in this unlawful conduct.

I. The Record In This Case Is Wholly Inadequate And Does Not Deserve This Court's Review.

The petitioners made a strategic decision to appeal this case without providing a reporter's transcript of the trial proceedings, and instead elected to proceed by means of an Appendix in Lieu of Clerk's Transcript. *Aguilar*, 21 Cal.4th at 128.[1] Having failed to provide a complete record, the petitioners deprive this Court of the crucial factual basis upon which the injunction was issued.

In light of the "limited record," *id.* at 126, that petitioners have provided, one can only speculate about the actual testimony presented at trial describing the pernicious, racially harassing work environment to which the respondents were subject while working at Avis. The First Amended Complaint is the only portion of the record that describes the factual allegations underlying this case.

According to the complaint, plaintiffs are Latino employees who filed an action for workplace harassment and discrimination against Avis and several management employees, including John Lawrence. Mr. Lawrence, the Service Station Manager at the San Francisco Airport Avis location, was authorized to direct and control the work of plaintiffs. The defendants harassed the plaintiffs for years,

[1] Appellants' Appendix In Lieu of Clerk's Transcript contains: (1) First Amended Complaint; (2) one page of Kathleen Black's testimony; (3) Special Verdicts for the twelve plaintiffs whose claims went to the jury; (4) Letter from Judge Carlos T. Bea regarding injunctive relief; (5) briefs regarding the Application for Injunctive Relief, Proposed Judgment and Permanent Injunction; (6) Proposed, Final and Amended Judgments; (7) Permanent Injunction; (8) Notice of Appeal; (9) Appellants' Notice to Prepare Reporter's Transcript; and (10) Appellants' Election to Proceed Under California Rules of Court, Rule 5.1.

and continued to harass them, on the basis of race. This race-based harassment included, *inter alia*: (1) repeated statements that all Latino employees were incapable of performing their jobs well; (2) repeated threats of job loss for the most minor infraction; (3) false accusations of theft; (4) rebukes for a purported inability to speak English; (5) habitual and unwarranted questions about immigration status; and (6) repeated demeaning and abusive comments. Appendix in Lieu of Clerk's Transcript (hereinafter "App."), 9:14-14:17. These allegations portray a workplace ridden with racially demeaning conduct and racially abhorrent language. Indeed, the jury found that Lawrence unlawfully harassed four Latino plaintiffs.

Beyond this we know very little about Lawrence's "continual barrage of opprobrious racist invective." *Aguilar v. Avis Rent A Car System, Inc.*, 50 Cal.App.4th 28, 36 (1996). For example, we do not know precisely what was said, to whom, when, or with what tone, frequency and intensity. We do know, however, that the workplace was the context for this display of discrimination and verbal abuse and that plaintiffs, as workers over whom Lawrence had some authority, could not avert their eyes, cover their ears, or shield themselves from the racist invective that poisoned their workplace. We also know that, despite the jury's verdict, Avis continues to employ Lawrence in a position of authority at its San Francisco facility.

The absence of a factual record is particularly glaring here where petitioners seek constitutional review of an order enjoining precisely the same discrimination and harassment that established defendants' liability for damages.[2] Without

[2] First Amendment jurisprudence requires *de novo* review of the complete record. *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 567 (1995). However, where the Court has *not* been presented a complete factual record, it will assume that the evidence and testimony presented to the lower court supported its findings. *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 771

the record it is impossible to evaluate the order in light of the actual proof of a racially hostile workplace adduced at trial. Nonetheless, the trial court judge, who presided over the case, evaluated the evidence and the credibility of the witnesses, and based thereon felt that injunctive relief was necessary and proper. Respondents' Appendix A (hereinafter "Resp. App. A"), 71-73.[3] The court noted that Lawrence "[has] been found to have done it four times to four different people over a period of years," *id.* at 76, and made an express finding that there was a "substantial likelihood" that John Lawrence would continue to engage in precisely the same unlawful discriminatory and harassing conduct, if left unrestrained:

> Well, the court is making a finding of fact based on evidence observed during the trial, that based on the evidence showing harassment and discrimination to the extent already commented on by Mr. Lawrence, there's a substantial likelihood based on his actions that he will do so in the future unless restrained.

Id. at 78-79.

II. The Petitioners Have Conceded That The Jury's Findings Of Liability Are Supported By Substantial Evidence.

By failing to appeal the underlying damage award, the petitioners have conceded that the jury's findings of liability under FEHA are supported by substantial evidence.

(1994) (asserting that Court will "judge this case on the assumption that the evidence and testimony presented to the state court supported its findings" germane to the First Amendment issue). In the absence of a complete record, this Court must assume, as did the California appellate courts, that there is substantial evidence to uphold the injunction.

[3] Respondents' Opposition to the petition for *certiorari* contains two appendices. Appendix A is the December 15, 1994 hearing transcript, and Appendix B is the February 6, 1995 hearing transcript.

Thus, the jury's findings are uncontested, and do not form any basis for this appeal.[4] Nor do petitioners claim that the damage award violates the First Amendment. *Aguilar,* 21 Cal.4th at 131. "For purposes of this case, therefore, it is established that Lawrence's conduct created a hostile or abusive work environment for plaintiffs on the basis of race, and that Avis properly was held liable for knowingly failing to prevent this misconduct by Lawrence." *Id.* The petitioners are not entitled to relitigate these findings.

Of course, the petitioners would very much prefer that the Court resolve this case in an analytical vacuum -- totally separated from the abhorrent evidence that established liability. Without evidence of the racist invective and demeaning racially motivated conduct, it is difficult, indeed impossible for this Court to get a true flavor of the pernicious work environment to which plaintiffs were subjected by Avis and Mr. Lawrence. Petitioners created the factual vacuum by failing to provide the necessary evidentiary record to evaluate the factual basis for the jury's findings and the court's injunction, and now seek review of a judgment in the abstract on the basis of extreme hypothetical scenarios. This case is undeserving of this Court's review based on this inadequate record.

III. The Jury's Verdict.

Contrary to the petitioners' assertion that the jury substantially rejected the respondents' case, Petition p.1, the "jury found that defendants had engaged in employment discrimination, in part by permitting plaintiffs to be the target of racial epithets repeatedly spoken by a fellow employee." *Aguilar*, 21 Cal.4th at 126. Specifically, the jury found that nine of the twelve plaintiffs were unlawfully harassed or discriminated against because of race, national origin or ancestry. Supervisor Kathy Black harassed or

---

[4] *See* App. at 179, Notice of Appeal.

discriminated against five plaintiffs, Black *and* Lawrence harassed or discriminated against two other plaintiffs, and Lawrence, alone, harassed or discriminated against two additional plaintiffs. Further, as to three of the four workers that Lawrence was held responsible for harassing or discriminating against, the jury found that Avis knew or should have known of Lawrence's conduct with respect to these employees, but that Avis failed to take immediate and appropriate action. *Id.* at 127; Resp. App. A at 81.

In an attempt to transform their loss at trial into a victory, the petitioners erroneously contend that the only special verdicts relevant to this petition pertain to those where the jury found that Lawrence harassed three plaintiffs. Petition, at 2. First, the jury found that Lawrence had unlawfully harassed or discriminated against a fourth Latino employee, Miguel Fonesca, although he was not awarded damages. *Aguilar*, 21 Cal.4th at 127. Further, it is significant that the jury found that five other Latino employees were also subjected to a racially hostile or discriminatory workplace by Supervisor Black. Clearly, Avis violated its duty to take affirmative steps to prevent and deter discrimination and harassment at its workplace.

IV. The Court's Factual Findings And Remedial Order.

After the ten-week trial in which the jury found that defendant Lawrence had racially harassed four Latino employees, the plaintiffs sought injunctive relief from the presiding judge. In their Application for Injunctive Relief, the plaintiffs noted that "relief is required because Avis ignored Lawrence's conduct for years in the face of numerous complaints and continues to tolerate Lawrence and because there is no assurance in fact or in experience with Avis that such conduct will not be repeated. . . . Lawrence has returned to work as an appointed lead position at the San Francisco Airport without discipline for his unlawful conduct

. . .." App. at 68:12-19. The trial court judge found that Lawrence was likely to continue to engage in unlawful racial harassment unless enjoined. *Aguilar*, 21 Cal.4th at 132.

The court noted that "there was evidence presented sufficient for the jury to find that . . . as to four plaintiffs . . . Lawrence had engaged in acts of harassment so continual and severe as to alter the working conditions for those people there . . .." Resp. App. A at 77-78; *see also* Resp. App. B at 224. The trial court noted that Mr. Lawrence had repeatedly harassed Latino employees:

> THE COURT: . . . I think the evidence here is sufficient that indicates that this man repeatedly harassed Latinos. And to avoid a multiplicity of torts, I don't want him doing that in Hayward or Oakland or in Santa Barbara.
>
> MS. DELLAVERSON: Well, I take issue with your statement that he repeatedly harassed Latinos because that's not what the jury found.
>
> THE COURT: They have $75,000. That's repeatedly.
>
> MS. DELLAVERSON: Three people.
>
> THE COURT: Okay. Anything else?

Resp. App. B at 240.

Citing all of the evidence presented at trial, the trial court found a "substantial likelihood" that Lawrence would harass and discriminate in the future unless restrained. Resp. App. A at 78-79. As the court explained, "where the use of derogatory racial epithets is a violation of law, it's a repetitive tort." Resp. App. B at 235. Because the unlawful harassment consisted primarily of derogatory ethnic epithets

and unwanted touching, the court issued a narrowly tailored order barring the continuation of such activities.

The permanent injunction states in pertinent part: "Defendant John Lawrence shall cease and desist from using any derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees of Avis Rent A Car System, Inc., and shall further refrain from any uninvited intentional touching of said Hispanic/Latino employees, as long as he is employed by Avis Rent A Car System, Inc. in California." App. at 159.[5] The Court of Appeal limited the injunction to the workplace, and ordered the trial court to provide "an exemplary list of prohibited derogatory racial or ethnic epithets, specifying epithets such as those actually used in the workplace by Lawrence" in order to "more precisely warn Lawrence and Avis what is forbidden." *Aguilar*, 50 Cal.App.4th at 47.

As modified, the injunction is narrowly tailored to proscribe only that verbal harassment that was found by the jury to violate the FEHA. First, it applies to Lawrence only while he is at work at Avis. *Id.* Second, it prohibits Lawrence from using racial or ethnic epithets – epithets such as those which established FEHA liability – against the Latino employees at Avis, or descriptive of those same Avis employees. *Id.* Thus, Lawrence can still direct racially offensive speech toward others at work, and can still direct such speech at anyone outside of work. In essence, this remedial order prevents only that verbal harassment for which the jury found defendants liable. The order does not require review.

---

[5] The injunction also ordered Avis to "cease and desist from allowing defendant John Lawrence to commit any of the acts described in [the above quoted paragraph], under circumstances in which it knew or should have known of such acts . . .." App. 159:18-25. Although the petitioners also challenge this portion of the injunction, they themselves proposed the specific language used. *See* Resp. App. B at 242.

V. The Petitioners May Not Augment The Inadequate Record With Appendix E.

The California Court of Appeal stated that John Lawrence was a manager. *Aguilar*, 50 Cal.App.4th at 32. The petitioners sought to augment the record to contest this ruling; however, this motion was denied by the California Supreme Court. Petitioners did not appeal this ruling. Thus, under California procedures and rules, Lawrence's status as a manager is established.

Despite this procedural background, the petitioners improperly submit Appendix E to the Court, containing their motion to augment the record on appeal with a jury instruction stating that Lawrence is not a supervisor.[6] The petitioners cannot have it both ways. They cannot refuse to provide the trial transcript of this case, fail to appeal the jury's findings of liability, fail to appeal a ruling denying their motion to augment, and then place that same rejected evidence in an appendix for this Court's review. *See First National Bank of North East v. Fockler*, 649 F.2d 213, 215 (4th Cir. 1981). Such tactics are nothing more than an "end-run" around the California Supreme Court's ruling. *See United States v. Moore*, 571 F.2d 76, 88 n.10 (2d Cir. 1978). This Court has refused to consider material outside the record. *Maryland Casualty Co. v. Jones*, 279 U.S. 792, 796 (1929). The Court should not consider Appendix E.

---

[6] Regardless of whether Lawrence is a "supervisor" as defined by the FEHA, the petitioners concede that Lawrence is a Lead Service Agent. App. at 82 n.3. Further, the plaintiffs alleged that Lawrence was "authorized to direct and control" them. App. at 3:17-19; 7:26-28; 8:9-19; 10:24-26. In short, the jury instruction does not contradict the proposition that Lawrence was in a position of authority at Avis over the plaintiffs, and continues to exercise this authority over the plaintiff or plaintiffs who continues to work at Avis.

ARGUMENT

I. This Case Is Not Appropriate For Review By The Supreme Court.

Review on a writ of *certiorari* is not a matter of right, but of judicial discretion exercised under compelling circumstances. Sup. Ct. R. 10. No such considerations apply here. There is no decision by another state court of last resort, or by a federal court of appeals, that conflicts with the decision of the California Supreme Court. Further, the California Supreme Court's decision is entirely consistent with governing Supreme Court precedent, and there is no need for this Court to reconsider the state court's decision.

A. The Petitioners Challenge The Trial Court's Findings Of Fact, But Fail To Produce Any Record Evidence To Contest These Findings.

Stripped of its free speech rhetoric, the petition here simply challenges the trial court's factual finding that there was a "substantial likelihood" that Lawrence would continue to engage in verbal harassment. "A petition for writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. The Court will not grant a writ of *certiorari* merely to review evidence or the inferences drawn from evidence. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178-79 (1938). Moreover, the petitioners' disagreement with the trial court's findings of fact cannot even be evaluated in any objective manner: the petitioners have intentionally failed to create an adequate trial court record. As the California Supreme Court correctly noted:

> Defendants . . . argue that the injunction was unnecessary because the record does not demonstrate

> that Lawrence "engaged in ongoing conduct that arguably might justify injunctive relief." The trial court found to the contrary . . .. In order to prevail on this claim, defendants must show that this finding is not supported by substantial evidence. But, as noted above, defendants elected not to provide a reporter's transcript of the trial proceedings. Accordingly, they have no basis upon which to argue that the evidence adduced at trial was insufficient to support the trial court's finding that injunctive relief was necessary to prevent a continuation of defendants' unlawful conduct.

Aguilar, 21 Cal.4th at 132. Where the record is cloudy, the Supreme Court may deny a petition for *certiorari*. *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950). Here the record simply does not exist.

Petitioners' challenge to the trial court's findings is largely based upon their repeated assertion that defendant Lawrence had not harassed anyone for at least two years preceding the trial. Petition, at 2, 13. That a defendant has ceased his unlawful activities does not preclude the issuance of an injunction. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). "The defendant is free to return to his old ways." *Id.* "Along with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct." *Id.* at 633.[7] Thus, the trial court was free to determine that despite the purported cessation of illegal activity, the likelihood that the unlawful harassment would continue warranted injunctive relief.

---

[7] For example, an injunction against a conspiracy to engage in unfair competition may be granted despite the conspirators' assurances that the unlawful conduct has ceased: "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 333 (1952) (citations omitted).

Indeed, the judge noted at the hearing that "nothing's changed out there," and that "I can see there was no change in the structure of either reporting or investigating the instances of claimed and proven racial harassment." Resp. App. A at 83, 86. Similarly, plaintiffs' counsel asserted in their Application for Injunctive Relief that Mr. Lawrence had not been disciplined or demoted for the harassment, App. At 68:12-19, and there is no record evidence to dispute this assertion.[8]

Other than defense counsel's arguments, there is nothing to support petitioners' contention that Lawrence had in fact ceased his unlawful conduct.[9] The defendants cite *two pages* of transcript purportedly from the trial, in which an unidentified witness[10] testifies that he cannot remember the years in which Lawrence used certain expressions every day, and that he does not have personal knowledge of Mr. Lawrence's ongoing conduct because their current work schedules overlap only slightly. By itself, this bit of

---

[8] Such a lackluster response by an employer is curious. "An employer subjected to well-founded claims of employment discrimination as a result of an employee's intentional acts of discrimination is not likely to look favorably upon the offending employee. To the contrary, the employer, to protect its own interests and to avoid further liability, almost certainly will impose some form of discipline upon the offending employee." *Reno v. Baird,* 18 Cal.4th 640, 654-55 (1998); *see also Carrisales v. Dep't of Corrections*, 21 Cal.4th 1132, 1139 (1999) (obligation "to take immediate and appropriate action when it is or should be aware of the harassment . . . forces employers to control and, as necessary, discipline their employees").

[9] At the remedies hearing, counsel for the petitioners asserted that the harassment had ceased two years prior. The trial court judge did not make any findings of fact regarding the timing of the purported cessation, but commented: "And if he hasn't done so since 1992 to the present, that may be because of the pending action." Resp. App. A at 79.

[10] The petitioners state that the witness is plaintiff Pedro Mojica, one of the four employees that the jury found was harassed by Lawrence. Petition, p. 2. However, the two pages of transcript have no caption identifying their source and no certificate from a court reporter authenticating them.

testimony does not support the petitioners' assertion that John Lawrence had stopped engaging in harassment years before the trial. Further, the testimony cannot be deemed the only basis for the trial court's conclusions regarding equitable relief. The trial court heard testimony over ten weeks from numerous witnesses about defendant Lawrence's conduct at various times and in various places.

Similarly, the petitioners' implication that only a single plaintiff benefits from the injunction is not supported by the record.[11] Moreover, even a single plaintiff who has been subjected to unlawful harassment is entitled to a remedial injunction.[12] That the petitioners have elected not to produce the trial transcript in this case, and to instead offer their own briefs, cannot operate to overturn the trial court's legitimate findings of fact.

B. There Is No Conflict Among The Courts As To The Constitutionality Of An Injunctive Remedy For Unlawful Harassment In Employment.

---

[11] The petitioners assert that Pedro Mojica is the only Avis employee who obtained damages from Lawrence and who worked for Avis at the time of the injunction hearing. Petition, p. 2. However, there is no basis in the record for determining which of the four plaintiffs harassed by defendant Lawrence continue in Avis's employ. Plaintiffs stated in their Application for Injunctive Relief that three of the harassed plaintiffs continue to work at Avis. Lawrence harassed one of them, plaintiff Mojica. App. at 76:15-17. The only references to particular plaintiffs leaving Avis's employ are made by petitioners' counsel. Petition, p. 2; Resp. App. A at 96-97. In response, the court noted that persons who left Avis's employ often returned to working there. Resp. App. A at 97. In addition, the court specifically found that plaintiff Mojica would benefit from the injunction. *Id.* at 99.

[12] Where a record demonstrates that a harasser's *modus operandi* is to direct epithets broadly at *groups* of individuals on the basis of race, rather than to focus abuse upon particular persons, there is no way to protect an individual prevailing plaintiff without an order restraining this distinctive form of harassment.

No other state court of last resort, and no circuit court of appeals, has ever ruled that an injunction barring race-based harassment in the workplace violates the First Amendment. Indeed, the only employment case cited by the petitioners as contrary to the California Supreme Court's decision is *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591 (5th Cir. 1995), *cert. denied*, 516 U.S. 974 (1995). That case did not consider the scope of injunctive relief, but considered whether columns containing "earthy satire" and published in a newsletter of the police officers' association could constitute sex-based harassment. Unlike the defendant John Lawrence, the association newsletter was not subject to the authority of the employer. *Id.* at 592. Unlike the facts of this case, the speech contained in the newsletter was not a one-way street: the female employees were given the opportunity to write a response in opposition to the columns. *Id.*

In this case, a jury found that the defendants, including defendant Lawrence, engaged in unlawful race-based harassment against nine employees. Without a trial transcript, it is nevertheless clear that the testimony described not "earthy satire," but a barrage of racial epithets.

The Fifth Circuit concluded that the plaintiff had failed to present evidence sufficient to support a jury verdict of harassment, and "[did] not reach the difficult question of whether Title VII may be violated by expressions of opinion published in the R.U. Withmi columns in the Association's newsletter." *Id.* at 596.[13] Accordingly, the *DeAngelis*

[13] The *DeAngelis* Court opined, "[w]here pure expression is involved, Title VII steers into the territory of the First Amendment. It is no use to deny or minimize this problem because, when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech." 51 F.3d at 596-97 (citing law review articles). This *dicta* reflects an academic challenge to discrimination and harassment laws that has been implicitly rejected by this Court. *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Harris v. Forklift Systems*, 510 U.S. 17 (1993); *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986). Even the law review articles cited by the *DeAngelis* court and by the petitioners (with one exception) concede that in some circumstances, pure speech that violates Title VII is not protected by the First Amendment. *See Aguilar*, 21 Cal.4th at 136 n.5.

opinion is not contrary to the California's Supreme Court ruling challenged here.

Further, a close analysis of the petitioners' arguments makes clear that their position is not merely that this particular injunction is unconstitutional under the First Amendment, but that *any* prohibition or punishment of verbal harassment through Title VII or comparable state laws is likewise contrary to free speech. Such a radical position is inconsistent with this Court's rulings, and has never been adopted by any circuit court of appeal, including the Fifth Circuit.[14] It is *not* a sufficient basis for a grant of *certiorari* that a federal question, abstractly considered, might present an intellectually interesting problem: the Court does not sit to satisfy scholarly interest. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). The petition should be denied.

C. The California Supreme Court's Ruling Is Consistent With Governing Supreme Court Case Law.

It is well-established under Supreme Court precedent that individuals may seek remedies for race-based, verbal harassment. This Court has repeatedly recognized that verbal harassment violates Title VII, and is actionable as unlawful employment discrimination.

[14] *See Skidmore v. Precision Printing & Packaging*, 188 F.3d 606, 615 (5th Cir. 1999); *Watts v. Kroger Co.*, 170 F.3d 505, 509 (5th Cir. 1999); *Jones v. Flagship Int'l*, 793 F.2d 714, 719 (5th Cir. 1986).

> [T]he language of Title VII is not limited to "economic" or "tangible" discrimination. The phrase "terms, conditions, or privileges of employment" evinces a congressional intent "to strike at the entire spectrum of disparate treatment of men and women" in employment.

Meritor Savings Bank FSB v. Vinson, 477 U.S. 57, 64 (1986) (citations omitted).

Specifically, "discriminatory intimidation, ridicule and insult," whether racist slurs and taunts or sexual innuendo, can be so severe and pervasive to alter conditions of employment and violate Title VII. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). The Court has described the harm imposed by unlawful harassment in the workplace:

> A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality.

Harris, 510 U.S. at 22. [15]

[15] Courts have long recognized that the workplace has unique attributes which render it amendable to a higher degree of regulation, including regulation of verbal conduct, than other spheres. Consideration of employer speech "must take into account the economic dependence of the employees on their employers," and be sensitive to the risk that employees, "because of that relationship," will find the speech to be threatening. *N.L.R.B. v. Gissell Packing*, 395 U.S. 575, 617 (1969). Further, "[s]ince the opportunity for employment free of discrimination is a civil right, . . . [a] plaintiff's status as an employee should entitle him to a *greater* degree of protection from insult and outrage than if he were a stranger to defendants." *Commodore Home, Inc. v. Superior Court*, 32 Cal.3d 211, 220 (1982) (citation omitted).

This Court has recognized that harassing speech violative of Title VII may be proscribed without offending the First Amendment.

> [S]ince words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. Thus, for example, sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices.

R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992) (citations omitted); *see also Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (upholding Wisconsin's penalty enhancement by analogy to Title VII where both punish discriminatory motive).

Employees are not at liberty to walk away from the harassing manager, nor may they respond to the offensive verbal harassment by engaging in a free exchange of ideas in the manner that the First Amendment contemplates. Unlike the onlooker who could avert his eyes from a United States flag decorated with peace symbols outside an apartment window, *Spence v. Washington*, 418 U.S. 405, 412 (1974), or a jacket bearing the words "Fuck the Draft," in a courthouse, *Cohen v. California*, 403 U.S. 15, 21 (1971), employees have

no such latitude at work. Employees subject to verbal harassment are a "captive audience" who are present at work as a "matter of necessity, not choice." *Lehman v. Shaker Heights*, 418 U.S. 298, 302-03 (1974). They are in a uniquely subordinate position, and may not reasonably respond to a barrage of invective without facing a substantial risk of retaliation or worse, job loss. Thus, the workplace as context for speech informs the degree of protection afforded by the First Amendment. *Id.* Indeed, "[n]othing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit . . .." *Rowan v. United States Post Office*, 397 U.S. 728, 737 (1970)[16] For this reason, racially denigrating speech which alters the conditions of employment may be proscribed to enforce the state's compelling interest in eradicating workplace discrimination.

II. The Challenged Injunction Is Not An Unconstitutional Prior Restraint.

The trial court's injunction merely prohibits the continued utterance of illegal speech that violates the FEHA. The California Supreme Court's holding is consistent with established case law regarding prior restraints: "[A] remedial injunction prohibiting the continued use of racial epithets in the workplace does not violate the right to freedom of speech if there has been a judicial determination that the use of such epithets will contribute to the continuation of a hostile or abusive work environment and therefore will constitute employment discrimination." *Aguilar*, 21 Cal.4th at 126. As such, this injunction, by

[16] "The Constitution does not require plaintiffs to sacrifice their employment to avoid a racially clamorous work environment any more than the doctor in *Frisby, supra*, 487 U.S. 474 was required to move from his home, the students in *Bethel School, supra*, 478 U.S. 675 were required to leave school, or the passengers in *Lehman v. City of Shaker Heights, supra*, 418 U.S. 298 were required to walk home." *Aguilar*, 21 Cal.4th at 161 (Werdegar, J., concurring).

definition, does not constitute an invalid prior restraint of speech. "Most of the problems plaguing the use of preliminary injunctive relief against expressive activity are irrelevant to the issuance of permanent injunctive relief following a full trial [before an independent judicial forum] because all of the procedural protections necessary for a full and fair adjudication are present. . . ." *See* Martin H. Redish, "The Proper Role of the Prior Restraint Doctrine in First Amendment Theory," 70 *Va. L. Rev.* 53, 89, 99-100 (Feb. 1984).

Here, there was a ten-week jury trial prior to the issuance of the injunction. Petitioners enjoyed the procedural safeguards of a full and fair hearing before an independent judicial forum. Lawrence was *not* enjoined from uttering his offensive racist invective prior to an ultimate judicial determination. It was only *after* a trial finding that such invective created a discriminatory and hostile work environment for Avis employees that this repetitive speech was transformed into illegal speech – violative of the FEHA – and thus proscribable. A remedial order barring the continuation of unlawful verbal harassment is consistent with Supreme Court precedent.[17]

A. Injunctive Remedies Do Not Constitute Illegal "Prior Restraints" When They Are Issued After A Full And Fair Trial On The Merits In Which The "Speech" Was Judicially Found To Constitute A Crime or Tort.

It is well-established that the court may order injunctive relief after a judicial determination that the speech

[17] Under the petitioners' analysis, almost any regulation of speech would fall within the definition of "prior restraint" since most restrictions on speech have consequences on later speech. *See Auburn Police Union v. Carpenter*, 8 F.3d 886, 903 n.25 (1st Cir. 1993).

violates another valid law whose central purpose is not aimed at protected expression. "A statute that is otherwise valid, and is not aimed at protected expression, does not conflict with the First Amendment simply because the statute can be violated by the use of spoken words or other expressive activity." *Aguilar*, 21 Cal.4th at 134, citing to *Roberts v. United States Jaycees,* 468 U.S. 609, 628 (1984). "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, *before* an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co. v. Pittsburgh Com'n on Human Relations*, 413 U.S. 376, 390 (1973) (emphasis supplied); *see also Auburn Police Union v. Carpenter*, 8 F.3d 886, 903 (1st Cir. 1993) ("An injunction that is narrowly tailored, based upon a continuing course of repetitive speech, and granted only after a final adjudication on the merits that the speech is unprotected does not constitute an unlawful prior restraint."). Prior restraints are disfavored only because they seek to regulate speech prior to a full and fair hearing to determine whether the challenged expression is constitutionally proscribable. *See* Redish, *supra*.

In *Pittsburgh Press*, this Court upheld an ordinance that barred newspapers from advertising "help wanted" classified jobs in a sex-segregated manner. The ordinance did not endanger arguably protected speech because it prohibited a "continuing course of repetitive conduct" whose discriminatory effect was readily apparent to the Court. 413 U.S. at 390. The Court held that "[d]iscrimination in employment is not only commercial activity, it is *illegal* commercial activity under the Ordinance." *Id.* at 388. Any First Amendment interest which might exist "is altogether absent when the commercial activity itself is illegal and the

restriction on advertising is incidental to a valid limitation on economic activity." *Id.* at 389.[18]

Similarly, in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), the Court upheld a statute prohibiting the sale and distribution of obscene materials *after* a judicial determination that the materials violated the statute. *Id.* at 441-42. The dissenting opinions challenged the Court's holding, citing the absence of an adequate evidentiary hearing or trial. *Id.* at 445-46 (Warren, J., dissenting), at 446 (Douglas, J., dissenting), and at 447-48 (Brennan, J. dissenting). In this matter, there was a ten-week trial, which certainly provided an adequate procedural safeguard even as contemplated by Justices Warren, Douglas and Brennan.

The petitioners argue that "it is constitutionally irrelevant" that the injunction was entered following a judicial finding, because "the prior restraint doctrine *assumes* that the speech is constitutionally unprotected." Petition, at 11. To the contrary, there is a critical distinction between a preliminary injunction – entered *prior to* any judicial determination regarding the alleged legality of the speech in question – and an injunction issued *after* there has been a judicial determination that the speech violates some other law. And, in the absence of such a judicial finding, courts presume that the speech in question is protected by the First Amendment. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942).

The petitioners' attempt to analogize *Near v. Minnesota,* 283 U.S. 697 (1931), to the instant case is unavailing. In *Near,* the Court held that a libel statute was unconstitutional as applied to a newspaper that had printed

---

[18] Indeed, this Court has held that "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (citation omitted).

purportedly libelous material in the past because it operated to entirely ban the newpaper's publication, regardless of whether future issues were libelous. *Id.* at 721. Here, unlike *Near,* the court did not bar Lawrence from speaking at all, but merely enjoined the exact verbal conduct that had already been deemed unlawful.[19] *See Kingsley Books,* 354 U.S. at 445 ("Unlike *Near*, [the restriction here] is concerned solely with obscenity and, as authoritatively construed, it studiously withholds restraint upon matters not already published and *not yet found to be offensive*.") (citations omitted) (emphasis supplied).[20]

---

[19] Petitioners' assertion that the injunction is flawed because it "does not seek to eliminate all speech that harms an employee's work environment, but only that speech that does so based on selected classifications" is specious. Petition, at 10. The injunction is limited only to the harassing and discriminatory conduct for which Lawrence was found liable and is the direct result of the jury's findings of race-based harassment and discrimination. Petitioners' citation to *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819 (1995) is unavailing. *Rosenberger* is a public forum case where a university favored one religious viewpoint over another. *Id.* at 831. Here, the court proscribed only that verbal harassment that was found to violate the FEHA and which it found that Lawrence was substantially likely to repeat.

[20] Additional cases cited by the petitioners consider the constitutionality of broad restraints of protected expression. They are inapplicable to the narrow restriction challenged herein. In *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539 (1976), the Court struck down a state court's order barring the press from publishing certain information about a criminal proceeding until the jury was impaneled. The Court noted that the order barred the truthful and timely reporting of public judicial proceedings, and was thus contrary to the traditional function of the press to ensure the integrity of the criminal justice system. Here, the interest of an Avis employee to use epithets at work does not compare to this critical function of a free press. In *Bantam Books* and *Southeastern Promotions,* the Court struck down nonjudicial prior restraints on speech. *See Bantam Books v. Sullivan,* 372 U.S. 58, 70 (1963) (practices of state Commission to suppress distribution of certain "objectionable" books found unconstitutional); *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975) (refusal of municipal theater to permit staging of musical Hair violated First Amendment). In neither case was there a judicial determination, prior to the restriction, that the speech was unprotected. *See also Collin v. Smith,* 578 F.2d 1197 (7th Cir. 1978) (application of

B. The California Supreme Court's Decision Does Not Alter First Amendment Jurisprudence.

The Court's decision does not create a "new exception to the First Amendment's prohibition against prior restraints." Petition, at 9. There are numerous areas of law in which "speech" is proscribable because it has been judicially found to constitute a tort or crime. These include defamation,[21] obscenity,[22] fighting words,[23] true threats,[24] incitement to imminent lawless activity,[25] copyright infringements,[26] invasion upon the right of publicity,[27]

---

village ordinance to bar march of National Socialist Party violated First Amendment); *Doe v. University of Michigan,* 721 F. Supp. 852 (E.D. Mich. 1989) (state university's conduct code barring stigmatizing speech was vague and overbroad). "[N]onjudicial restraint of expression prior to ultimate judicial review is the only form of prior restraint appropriately subjected to a special negative presumption." Redish, *supra,* at 77. Here, the trial court issued the order after a full trial on the merits.

[21] *Time, Inc. v. Firestone,* 424 U.S. 448, 455 (1976) (jury verdict in favor of plaintiff alleging libel upheld where plaintiff not a public figure); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 345 (1974); *New York Times v. Sullivan,* 376 U.S. 254, 269 (1964).

[22] *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 445 (1957) (upholding injunction of obscenity found to be constitutionally unprotected); *Miller v. California,* 413 U.S. 15, 26 (1973); *Roth v. United States,* 354 U.S. 476, 492 (1957).

[23] *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572 (1942); *Gooding v. Wilson,* 405 U.S. 518 (1972).

[24] *Watts v. United States,* 394 U.S. 705, 707-08 (1969).

[25] *Hess v. Indiana,* 414 U.S. 105, 107-9 (1973); *Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969).

[26] *Harper & Row, Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539, 568-69 (1985) (First Amendment does not shield speech that infringes copyright); 17 U.S.C. § 502 (courts may grant "final injunctions on such terms as [they] may deem reasonable to prevent or restrain infringement of a copyright").

[27] *Zacchini v. Scripps-Howard Broad. Co.,* 433 U.S. 562, 574-75 (1977) (First Amendment does not bar tort of invasion upon "right of publicity").

trademark infringements,[28] price fixing,[29] false light invasion of privacy,[30] false advertising,[31] trade secrets disclosure,[32] securities fraud,[33] and employment discrimination and harassment.[34] "Certain forms of expression in certain contexts have been found unprotected, presumably because the danger of this expression to society outweighs its benefits." Redish, *supra,* at 92.[35] Race-based

[28] *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.,* 483 U.S. 522, 534-35 (1987); *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.,* 469 U.S. 189, 198 (1985); 15 U.S.C. § 1116(a) (courts shall have "power to grant injunctions, according to the principles of equity" for trademark violations).

[29] *F.T.C. v. Superior Court Trial Lawyers' Assoc.,* 493 U.S. 411, 428, 431 (1990) ("This Court has recognized the strong governmental interest in certain forms of regulation, even though such regulation may have an incidental effect on rights of speech and association. . . . The most blatant, naked price-fixing agreement is a product of communication, but that is surely not a reason for viewing it with special solicitude.").

[30] *Cantrell v. Forest City Publishing Co.,* 419 U.S. 245, 248 (1974); *Time, Inc. v. Hill,* 385 U.S. 374, 390 (1967).

[31] *Ibanez v. Florida Dep't of Bus. & Prof'l Reg.,* 512 U.S. 136, 142 (1994), citing *In re R.M.J.,* 455 U.S. 191, 203 (1982) ("Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. . . . Misleading advertising may be prohibited entirely.").

[32] *Kewanee Oil Co. v. Bicron Corp.,* 416 U.S. 470, 474-75 (1974)

[33] *Bateman Eichler, Hill Richards, Inc. v. Berner,* 472 U.S. 299, 304 n.7 (1985) (inducing security purchases through false and materially incomplete statements unlawful); *S.E.C. v. Capital Gains Research Bureau, Inc.,* 375 U.S. 180, 181-82 (1963) (court may enjoin investment advisor to compel disclosure to clients of conflict of interest); S.E.C. Rule 10b-5(b) (unlawful for any person "[t]o make any untrue statement of material fact or to omit to state a material fact").

[34] *Pittsburgh Press Co. v. Pittsburgh Com'n on Human Relations,* 413 U.S. 376, 388-89 (1973); *Burlington Industries v. Ellerth,* 524 U.S. 742, 752 (1998); *Faragher v. City of Boca Raton,* 524 U.S. 775, 787-88 (1998); *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 21 (1993); *Meritor Savings Bank FSB v. Vinson,* 477 U.S. 57, 66 (1986); *see also* Cal. Gov't Code § 12940(h) (harassment as unlawful employment practice).

[35] Where no law is violated, the speech is protected. *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971). The Court found that leafleting that opposed practices of real estate broker did not constitute the tort of invading the broker's right to privacy, and could not be

harassment in violation of state or federal anti-discrimination law is simply one such category of proscribable speech. *See R.A.V. v. City of St. Paul,* 505 U.S. 377, 389 (1992) ("Thus, for example, sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices . . .").

In such cases, it is not uncommon for an injunction to issue barring verbal conduct upon a judicial determination on the merits that the speech amounted to a tort or crime and is therefore unprotected.[36] Verbal conduct that has been found

thereby justified. Further, an injunction barring the distribution of literature "of any kind" could not operate to redress private wrongs. *Id.* at 418-20. Here, the injunction bars the precise speech that was found to constitute unlawful race harassment.

[36] *Pittsburgh Press,* 413 U.S. 376; *Kingsley Books,* 354 U.S. 436; *Transgo, Inc. v. AJAC Transmission Parts Corp.,* 768 F.2d 1001, 1022 (9th Cir. 1985), *cert. denied,* 474 U.S. 1059 (1986); *Auburn Police Union v. Carpenter,* 8 F.3d 886, 903 (1st Cir. 1993) (injunction of charitable solicitation permitted only "after a final adjudication on the merits that the speech is unprotected"); *Castrol, Inc. v. Pennzoil Co.,* 987 F.2d 939, 949 (3d Cir. 1993) (injunction proper "because there has been an adequate determination that [the expression] is unprotected by the First Amendment"); *Lothschuetz v. Carpenter,* 898 F.2d 1200, 1208 (6th Cir. 1990) (directing entry of "narrow and limited injunction to prohibit [the defendant] from continuing and reiterating the same libelous and defamatory charges"); *E & J Gallo Winery v. Gallo Cattle Co.,* 967 F.2d 1280, 1297 (9th Cir. 1992); *Kramer v. Thompson,* 947 F.2d 666, 675 (3d Cir. 1991) (an injunction will generally not be unconstitutional if a "jury has determined that the speech is not constitutionally protected"); *SEC v. Wall Street Publ'g Inst.,* 851 F.2d 365, 370 (D.C. Cir. 1988); *Anderson v. Dean,* 354 F. Supp. 639, 642 (N.D. Ga. 1973) ("an injunction directed against a libel is not unconstitutional"); *Retail Credit Co. v. Russell,* 218 S.E.2d 54, 62 (Ga. 1975) (upholding injunction against statements that already had been found to be "false and defamatory"); *O'Brien v. University Community Tenants Union, Inc.,* 327 N.E.2d 753, 755 (Ohio 1975) ("Once speech has judicially been found libelous, if all the requirements for injunctive relief are met, an injunction for restraint of continued publication of that same speech may be proper"); *Advanced Training Sys., Inc. v. Caswell Equip. Co.,* 352 N.W.2d 1, 11 (Minn. 1984) (approving injunction against libel issued after "full adversarial

by a jury to constitute unlawful race-based harassment may similarly be enjoined consistent with the First Amendment.

III. Injunctive Relief Is An Essential Remedy To Ensure That Racial Discrimination Ceases.

Equitable relief is an indispensable tool in assuring the reality of a workplace free from discrimination and harassment. Title VII specifically empowers the court to order appropriate relief upon a finding of discrimination. 42 U.S.C. § 2000e-5(g)(1).[37] Similarly, the FEHA states that "in order to eliminate discrimination, it is necessary to provide effective remedies that will *both prevent and deter* unlawful employment practices and redress the adverse effects of those practices on aggrieved persons." Cal. Gov't Code § 12920.5 (emphasis supplied); *see also* Cal. Gov't. Code § 12965(c)(3) (courts may award damages and "any other relief that, in the judgment of the court, will effectuate the purpose of the Act.").

The historic purpose of equity is to secure "complete justice." *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 418 (1975). Where racial discrimination is concerned, "the [district] court has not merely the power but the duty to render a decree which will so far as possible . . . bar like discrimination in the future." *Id.; see also McKennon v. Nashville Banner Publ'g Company,* 513 U.S. 352, 357-58 (1995) (remedial measures in anti-discrimination statutes "serve as a 'spur or catalyst' to cause employers 'to self-

---

proceedings"); Redish, *supra*, at 91-92 ("Once the solicitation [of a crime] has been made, a court, instead of criminally prosecuting the speaker, could restrain her from soliciting again, under threat of a contempt citation.").

[37] The legislative history of the Equal Employment Opportunity Act of 1972 states that upon a finding of a violation of Title VII, courts are to "fashion the most complete relief possible." 118 Cong. Rec. 7168 (1972); *see also Albemarle Paper Co. v. Moody,* 422 U.S. at 418 ("Congress took care to arm the courts with full equitable power.").

examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of discrimination."). Equitable remedies promote public policy by preventing further unlawful discrimination and by protecting aggrieved employees from the fear of future retaliation for filing charges of discrimination. *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1519 (9th Cir. 1989).

"The equitable relief ordinarily available in Title VII workplace harassment cases is an injunction prohibiting further harassment." *Amirmokri v. Baltimore Gas & Elec. Co.,* 60 F.3d 1126, 1132 (4th Cir. 1995); *see also Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1092 (1983) ("an injunction concerning future conduct ordinarily is, and should therefore be routinely awarded once liability is established"). Indeed, a plaintiff is entitled to injunctive relief "unless the employer proves it is unlikely to repeat the practice." *Hacienda Hotel*, 881 F.2d at 1519; *see also Bouman v. Block*, 940 F.2d 1211, 1233 (9th Cir. 1991), *cert. denied*, 502 U.S. 1005 (1991).

Without the option of an injunctive remedy, an employee who has endured unlawful harassment at the hands of a coworker or supervisor, and who faces continued harassment, would be forced to either leave the company's employ or file repeated actions for damages. Such an outcome is unfair and unworkable: "Victims of employment discrimination are frequently unemployed -- many times as the result of the alleged discrimination. They often lack financial resources. For such individuals, the costs of litigation pose a formidable barrier to the filing and prosecution of an FEHA action." *Brown v. Superior Court,* 37 Cal.3d 477, 485-86 (1984).

Numerous federal courts have issued injunctions barring future racial or sexual harassment after finding that

such harassment violates Title VII.[38] Indeed, such injunctions are perhaps the central means of providing "effective remedies against the evil." *Commodore Home, Inc. v. Superior Court*, 32 Cal.3d 211, 220 (1982). In each of these cases, the enjoined conduct had been judicially determined to have violated the law. *See Pittsburgh Press*, 413 U.S. 376.

In this case, the racial harassment was conceded to be unlawful, and was remedied through a narrowly drawn injunction prohibiting continued verbal harassment.[39] The

[38] *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 361 n.23 (1st Cir. 1989), *cert denied*, 496 U.S. 937 (1990) (court has broad power to restrain unlawful acts that it believes are likely to be committed in the future unless enjoined); *Snell v. Suffolk County*, 782 F.2d 1094, 1104 (2d Cir. 1986) (employer has duty to take reasonable steps to eliminate racially combative workplace fraught with verbal, race-based harassment); *EEOC v. Northwest Airlines, Inc.*, 188 F.3d 695, 702 (6th Cir. 1999) (injunctive relief appropriate where employer fails to respond adequately to race-based verbal harassment); *EEOC v. Gurnee Inn Corp.*, 914 F.2d 815, 817 (7th Cir. 1990) (injunction appropriate because of the possibility that sexual harassment would persist even after the harasser was fired); *Dombeck v. Milwaukee Valve Co.*, 40 F.3d 230, 238 (7th Cir. 1994) (order enjoining future harassment upheld where employer could alter temporary work assignments separating plaintiff from the harasser); *EEOC v. Hacienda* Hotel, 881 F.2d 1504, 1518 (9th Cir. 1989) (ongoing harassment creates multiple violations of Title VII which "require[] that a permanent injunction issue"); *EEOC v. Beverage Canners*, 897 F.2d 1067, 1070 (11th Cir. 1990) (permanent injunction ordering the defendant company to refrain from maintaining a racially hostile workplace where plaintiffs suffered a barrage of overt, denigrating and shocking racially derogatory remarks); *Ruffin v. Great Dane Trailers*, 969 F.2d 989, 993 (11th Cir. 1992), *cert. denied*, 507 U.S. 910 (1993) (injunction appropriate to prevent recurring violations where there was possibility of future violations of rights of plaintiff and other black employees).

[39] Petitioners' repeated assertion that Lawrence did not engage in harassing conduct preceding the trial is unsupported by the record. *See supra* at 12-13. Consequently, their citations to cases suggesting that harassment "dissipates" over time are unpersuasive. In the absence of a factual record from which one might evaluate fairly the nature of the harassment over time, it is ludicrous to suggest that, as a matter of law, the verbal harassment at issue here dissipated. Each of the cases cited by the petitioners involved a rigorous factual analysis. The trial court found that there was a "substantial likelihood" that Lawrence would continue to engage in unlawful verbal harassment, and the petitioners have provided no trial record by which to evaluate this conclusion.

order was a proper exercise of the court's authority to fashion an effective remedy which will prevent and deter unlawful practices. The California Supreme Court's decision should be upheld.

IV. The State Has A Compelling Interest In Remedying And Deterring Unlawful Employment Discrimination And Harassment.

Article I, section 8 of the California Constitution and the Fair Employment and Housing Act, Cal. Gov't. Code § 12900, *et seq.* articulate California's legitimate and compelling interest in barring and preventing all forms of employment discrimination, including race-based discrimination and harassment, from the workplace.[40] "The policy that promotes the right to seek and hold employment free of prejudice is fundamental." *Commodore Home, Inc. v. Superior Court*, 32 Cal.3d at 220. The California Supreme Court has deemed sexual and racial discrimination to be "obnoxious to the interests of the state and contrary to public policy and sound morality." *Gantt v. Sentry Insurance*, 1 Cal.4th 1083, 1101 (1992).

[40] Article I, section 8 ("A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin."); Cal. Gov't Code § 12920 ("It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination . . . . "); Cal. Gov't Code § 12921 ("The opportunity to seek, obtain and hold employment without discrimination . . . is hereby recognized as and declared to be a civil right.."); *Rojo v. Kliger*, 52 Cal.3d 65, 90 (1990) ("No extensive discussion is needed to establish the fundamental *public* interest in a workplace free from the pernicious influence of sexism. So long as it exists, we are *all* demeaned.").

The purpose of the FEHA is to prevent discriminatory practices in employment and, if not, to eliminate any adverse effects resulting therefrom. *Peatros v. Bank of America,* 22 Cal.4th 147, 166 (2000). This Court has recognized that "[t]he historical police powers of the States extend to employment, including discrimination therein." *Id.* at 159, citing *De Canas v. Bica,* 424 U.S. 351 (1976) and *Railway Mail Ass'n v. Corsi,* 326 U.S. 88 (1945). Indeed, "the Government has a fundamental, overriding interest in eradicating racial discrimination," and this interest is sufficiently weighty to overcome First Amendment rights. *Bob Jones Univ. v. United States,* 461 U.S. 574, 604 (1983). Here, the trial court's remedial order advanced the state's fundamental interest in eradicating race discrimination without unlawfully infringing upon defendants' First Amendment rights.

CONCLUSION

The challenged order is constitutional, and furthered California's legitimate and compelling state interests. This Court should deny the petition for *certiorari*.

Dated: March 16, 2000

Respectfully submitted,

Patricia A. Shiu
Counsel of Record
For Respondents
Oscar Aguilar, *et al.*

APPENDICES

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO
BEFORE THE HONORABLE CARLOS BEA, JUDGE
DEPARTMENT NO. 16

OSCAR AGUILAR, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 948597
	)	
AVIS, INC., ET AL.,	)	
	)	
Defendants.	)	
	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
POST-TRIAL MOTIONS
DECEMBER 15, 1994

APPEARANCES:

FOR THE PLAINTIFF(S):

BRONSON, BRONSON & MC KINNON
BY: EDWIN L. CURREY, ESQ.
505 MONTGOMERY
SAN FRANCISCO, CA 94111
(415) 986-4200

FOR THE DEFENDANT(S):

MC KENNA & CUNEO

BY: JOANNE DELLAVERSON, ESQ.
-AND-
DONNA M. RUTTER, ESQ.
-AND-
JOEL P. KELLY, ESQ.
STEUART STREET TOWER
ONE MARKET PLAZA
SAN FRANCISCO, CA 94105
(415) 267-4000

OFFICIAL COURT REPORTER:

KERY GILLET
C.S.R. NO. 3352

DECEMBER 15, 1994

---000---

THE CLERK: Superior court case number 948597, Oscar Aguilar, Carlos Benavides, Francisco Diaz, Hernan Figueroa, Miguel Fonseca, Ramiro Hernandez, Pablo Icabalceta, Hubert Jimenez, German Lazo, Pedro Mojica, Orlando Peraza, Oswaldo Ramirez, Marcos Recinos, Carlos Reyes, Francisco Rosales, Tomas Rubio, and Mario Serrano, plaintiffs, versus Avis, Inc., Kathy Black.

THE COURT: Just make it "et al.," and give us a number.

THE CLERK: Counsel, state your appearance, please.

MR. CURREY: Edwin L. Currey, Jr., for the plaintiffs.

MS. DELLAVERSON: JoAnne Dellaverson for all the defendants.

THE COURT: Mr. Kelly and Ms. Rutter are also present.

MR. KELLY: Yes, Your Honor.

THE COURT: The first thing is the motion to quash the subpoena.

My recollection of the case is the evidence was going to come in before the jury; and the equitable remedies, if any, were to be addressed to the court.

I believe that I should decide this case based on the evidence that came in at trial for two reasons. One, that was my thinking at the time that all the evidence would come in for both equitable and legal

remedies of the trial. Second, I seem to recall that at the trial the testimony was that the conditions with respect of the racial- or ancestry-harassment discrimination policies had been changed from the time of the alleged acts or proven acts in some cases and the time of trial. And that being the situation, I don't think I need any further testimony that there's been no change. That was the situation then; and that's the situation now. And if it needs any remedies, that's the situation that has to be changed.

MR. CURREY: I -- I agree with that as far as it goes, Your Honor. The reason that Mr. Lawrence was subpoenaed goes to the issue about the -- I think the plaintiffs' -- I beg your pardon -- the defendants'contention that there is no threat of continued violation.

And -- and we -- as we read the law, they have to give assurances, clear and convincing assurances, that it's not going to be repeated.

And the reason Mr. Lawrence was subpoenaed goes to that particular issue.

THE COURT: Mr. Currey, based on a finding that, in four cases out of the that went to the jury, Mr. Lawrence was found to have harassed the plaintiffs, those four plaintiffs –

MR. CURREY: Correct.

THE COURT: -- only three were covered because there was a failure to prove damage in the case of Fonseca. Based on the court's viewing of Mr. Lawrence and the

testimony of how long he had been employed at Avis and how he reacted to questioning, it is not difficult for me to foresee how Mr. Lawrence will act based on his prior actions.

And I believe you're correct that the burden of proof is on the defendants to show that Mr. Lawrence will not continue to act in a way the jury found he did act as to four of the 12 defendants. And if those actions require him to be told not to act similarly, I don't need any further testimony.

MR. CURREY: I did it out of an abundance of caution, Your Honor, on that particular issue.

THE COURT: Let me get one thing straight.

You are not asking for a prohibitory injunction as to Kathy Black, is that correct?

MR. CURREY: That is correct. That is correct, Your Honor.

MS. DELLAVERSON: Excuse me. Your Honor, may we release Mr. Lawrence? He's sitting by his telephone; so if we're not going to order him, may we release him?

THE COURT: Yes. You can release him. There won't be any necessity.

Mr. Mojica -- that's Mr. Mojica, isn't it?

You're welcome to be here; you're a plaintiff. But you're not going to be called upon to testify.

MS. RUTTER: I want to make something clear for the record.

The motion to quash was not granted?

THE COURT: That's correct.

MS. RUTTER: I would request, as in our moving papers, attorney fees. And I believe this was done in bad faith.

And if you look at the exchanges between Mr. Currey and Ms. Dellaverson, in terms of giving any authority, there was never any authority given because there is no authority to issue such a subpoena. And we had to spend time in the middle of having to prepare for this hearing to unnecessarily file a motion to quash a subpoena, again, by the way, that we never received to this date in our office.

And I think that sanctions in terms of attorneys' fees as requested, $462, is more than appropriate here.

THE COURT: Why do you think you have a right to get a copy of the subpoena?

MS. RUTTER: We represent Mr. Lawrence. He was a defendant in the case. And I think we're entitled to get a copy of the subpoena.

That's a side issue.

THE COURT: Why?

MS. RUTTER: Again, he is a party in this case.

THE COURT: Do you think that all parties who are subpoenaed, that copies of subpoenas have to go to their attorneys?

MS. RUTTER: I believe that's appropriate.

THE COURT: Probably that means you would like it to

be. But where's the law that says it has to be done?

MS. RUTTER: I don't have the authority that says it--

THE COURT: It would be news to me. I mean, yes, if you wish to produce a witness by use of 1987 CCP, you will get a copy of that notice to produce and no subpoena will issue.

But service of a subpoena by a court officer upon a witness, whether he's a party or not, is a perfectly proper way to produce evidence; and no copies need to be given to counsel --

MS. RUTTER: Well --

THE COURT: -- that I know of, unless there's been some legislation that has been passed that I don't know about.

MS. RUTTER: Regardless of whether there's authority or not, it's of a professional nature. The request for attorneys' fees is for the filing of that subpoena requiring us to prepare a motion to quash while we're trying to prepare for this equitable relief here. And I think it's inappropriate.

THE COURT: First of all, let me say that there is nothing in the Code of Civil Procedure which allows me to grant sanctions based on what counsel believes to be inappropriate. And as a matter of fact, I don't think the word inappropriate appears in the Code of Civil Procedure.

But secondly, if there is any basis for granting sanctions, it's 128.5 or 177.5 of the Code of

Civil Procedure; and that calls for frivolous actions.

I don't believe Mr. Currey was being frivolous in having the subpoena served on Mr. Lawrence; so, therefore, your motion is denied.

MS. RUTTER: Thank you.

THE COURT: The motion for sanctions is denied. The motion to quash the subpoena is granted.

Now, did you get that as a matter of the minutes?

All right. Now, Ms. Dellaverson?

MS. DELLAVERSON: Yes, sir.

THE COURT: Why shouldn't I grant a mandatory injunction prohibiting Lawrence -- and we'll get to Avis in a minute - - Lawrence from harassing any employees at San Francisco Avis Airport on the basis of their ancestry or racial characteristics, including Hispanic Latinos?

He's been found to have done it four times to four different people over a period of years. Why shouldn't I restrain him from doing it further so that he knows that, if he does it, he will be liable for violation of an injunction, which brings with it contempt citations for each and every instance, that meaning up to five days in county jail and up to $1,000 per violation. Why shouldn't I do that?

MS. DELLAVERSON: For the simple reason, Your Honor, that the evidence that was presented to the jury had to do with events that had taken place in the past.

The individuals whom he was found to have

harassed - - there were four of them as I recall - - all testified to events that had occurred in the past.

Mr. Mojica, who is the only gentleman still working for Avis, testified that he had not had interaction with Mr. Lawrence since 1991.

It's - - I believe the case law is that injunctions are appropriate when there is evidence of ongoing harm. There was no evidence presented to the jury of ongoing harm.

The only evidence that was presented that I recall that had to do with the present day was the evidence that we presented through Mr. Tom Walter, the airport manager, the present-day airport manager, who testified there had been no complaints whatsoever about Mr. Lawrence.

We also had the union business agent testify that there were no complaints at all about Mr. Lawrence. There is a union in place now to grieve any difficulties that anybody has with Mr. Lawrence or anyone else.

And the bottom line, sir, is that there simply was no evidence presented of ongoing harm or a danger of ongoing harm.

THE COURT: Well, there was evidence presented sufficient for the jury to find that on four occasions -- not on four occasions, but as to four plaintiffs who were working there, all of whom had a common characteristic, that is, that they were Latinos or members of Hispanic Latino racial ancestry, Lawrence had engaged in acts of

harassment so continual and severe as to alter the working conditions for those people there, because that was the statutory test;

Secondly, that Avis knew or should have known of that harassment. It may be that the bringing of the action at the Department of Fair Employment and Housing and the action here had a chilling effect on the harassment. But I want to make sure that that chilling effect survives the end of this process.

So I am going to grant an injunction --

MS. DELLAVERSON: May I say something before you do?

THE COURT: Yes.

MS. DELLAVERSON: The testimony before that was presented before the court and the jury was almost exclusively that the events took place in 1991 and 1992, not that it was ongoing at the present.

I don't believe there was any showing made of substantial likelihood of it continuing into the future; nor, may I point out, was this a class action. There was no class action here.

This was not a action brought by the department, by the commission, or by a class of people represented by the plaintiffs. These were individual plaintiffs bringing this action. There is no standing for any -- for them to pursue a prohibitory injunction against Mr. Lawrence.

THE COURT: Well, the court is making a finding of fact based on evidence observed during the trial, that

based on the evidence showing harassment and discrimination to the extent already commented on by Mr. Lawrence, there's a substantial likelihood based on his actions that he will do so in the future unless restrained. And if he hasn't done so since 1992 to the present, that may be because of the pending action.

And I think that the fact that there's legal action against him has a salutary effect on him. And I mean to keep it going by granting the prohibitory injunction.

It isn't necessary for me to find that this is a class action. If he has done it four times against four Latinos, there is a substantial likelihood that he will do it again, maybe against Latinos and maybe against others, but certainly against Latinos.

So, therefore, plaintiffs' application for a mandatory injunction against Mr. Lawrence from engaging in any harassment or racially discriminatory workplace practices such as were found by the jury is granted.

MS. DELLAVERSON: What are the terms? Are - - what --

THE COURT: He is not to harass employees, including Hispanic Latinos, in the future.

MS. DELLAVERSON: Including?

THE COURT: Including.

MS. DELLAVERSON: In other words a Black person-

THE COURT: Well, I don't want him restrained from harassing Latinos and changing the object of harassment to others.

MR. KELLY: There's no evidence before the court with respect to harassment of -- the court specifically indicated at the time of trial - -

THE COURT: There isn't any. But what's the harm, Mr. Kelly?

MS. DELLAVERSON: We're going to be back here because, Your Honor - -

MR. KELLY: The court again is limited by the evidence that was presented at the trial. If the court is--

THE COURT: I'll take your point. All right. He's not to harass any employees who are Hispanic Latinos based on their ancestry, race. It's a permanent injunction, not for a period of time. As long as he works at Avis, he will not so harass.

You'll have to draft that, Mr. Currey.

MR. CURREY: I will, Your Honor.

MS. DELLAVERSON: Is this limited to the San Francisco Airport facility?

MR. CURREY: We're just asking for relief based on the--

THE COURT: That's all you're asking for; that's all I'll give.

MR. CURREY: That's right.

THE COURT: Now, what about Avis, the prohibitory injunction against Avis, not to allow its employees to harass Hispanics or Latinos at San Francisco Airport in the future based on their ancestry or racial

characteristics?

The jury found that in three cases out of 12, Avis knew or should have known of Lawrence's harassment of Recinos, Fonseca, Peraza, and Mojica. Is there any reason to believe, based on this evidence, that a similar injunction should not be entered against Avis?

MS. DELLAVERSON: Yes.

THE COURT: Why?

MS. DELLAVERSON: For the -- well, I won't repeat myself in terms of what I've already said about Mr. Lawrence.

The additional -- everything I -- for the same reasons that I -- I just stated regarding Mr. Lawrence and the evidence presented to the jury as to ongoing activities that even could possibly be construed as discriminatory.

There was no evidence of that presented, and I believe Your Honor is bound by that. The only evidence presented is what we presented by Mr. Walter.

Again, there is a union present. Additionally, the only testimony that was presented that was about what Avis knew or should have known had to do with Kathy Klopfer, who was not at the airport anymore and hasn't been for six or seven months now; so to that extent, it was the nexus between Mr. Lawrence and Avis that has changed.

So for that reason I do not – I – we would

request that the court not enter --

THE COURT: But there were several supervisors between Mr. Lawrence and Ms. Klopfer.

MS. DELLAVERSON: Not who are there anymore.

THE COURT: None of whom are there anymore, but all of whom were interchangeably there whilst Lawrence was harassing Recinos, Fonseca, Peraza, and Mojica, which the jury found Avis knew or should have known.

MS. DELLAVERSON: Your Honor, there wasn't evidence presented that I know of -- I have no daily transcript, but as to what I know of -- as to those four individuals, there were complaints made to various people that Avis ignored. Testimony that went in is Avis should have known because there were complaints made.

I know what the jurors I interviewed told me; but I don't believe there was evidence presented as to those four sufficient to justify something as serious as a permanent injunction or temporary injunction, whatever you're thinking of entering against Avis in this matter, given the fact that there was no testimony, no evidence that there is ongoing discriminatory conduct at Avis.

We are talking about an extremely serious matter.

MR. KELLY: There are two issues I think the court should be focusing on, to the extent that there were findings of liability as to those three or four individuals. They are: They've been compensated for that. The jury's reached a decision.

The issue now is to the future. To the extent that middle management has had 100-percent turnover and is not there anymore, to the extent that the object of Mr. Currey's closing statements, Miss Klopfer, is not there anymore, I would strongly suggest that there is no information before the court as to Avis.

It's undisputed Mr. Lawrence is back at work. We know that. I don't believe there's any evidence that he has done anything in this case since 1992. The court's already ruled on that.

The question with respect to the injunction is not remedial; it is prospective. Is there some substantial showing of a likelihood that Avis, after having gone through this very expensive process over the last two and a half years, after having been found liable as to these three individuals we're talking about, John Lawrence is still going to engage in the conduct?

We would dispute that it is our burden. But that is what the court has said. With respect to every California case we have found, and indeed with respect to the U.S. supreme court's decision in Grant, the burden is on the moving party to show that there is an immediate risk of harm unless something is done.

THE COURT: I already found that, it having been shown that over the years there was this discrimination, and given the fact that nothing's changed out there and they're still employing a good percentage of Latinos, it's likely to happen again. That's what I'm saying.

I'm making a finding that human nature and human business organizations do not change that rapidly simply because a lawsuit has been brought. I think that there's substantial likelihood that Avis will allow the same type of harassment which the jury found in the three cases in which they awarded damages to happen again.

And I don't want that to happen again, and it shouldn't happen again. The best way that we could prevent it from happening again is to enjoin Avis from allowing it to happen again.

MR. KELLY: Certainly any case in which there has been testimony about prior discriminatory conduct, an argument could be constructed as to what might happen; but we know from looking at the cases that there are many in which injunctive relief is denied as unnecessary.

I would again submit there was no evidence submitted during the trial. Plaintiffs had an opportunity. We made objections to various points as to relevance. But as to equitable relief, those objections were overruled.

They had an opportunity to present to the court specific facts to show there was some substantial likelihood.

The cases talk in terms of immediate need for injunctive relief, an immediate risk of harm. I would submit that that is a higher burden than simply sitting here speculating what might happen based on events two, three years ago.

We're not talking about John Lawrence. The court has made a decision over our objection to enter a mandatory injunction as to him. The question now is as to what is in effect a new employer.

There's totally new management out there at the San Francisco location as to a new employer from top to bottom.

There is some evidence before the court that this conduct is not likely to be repeated, without the need for an injunction.

THE COURT: The reason why I'm leaning to give an injunction against Avis is because Avis management must be told that they cannot allow harassment or racial discrimination, regardless of who the management is, that it's happened before and it's likely to happen again. The past is the precursor of the future.

In this particular case, the jury have found in four cases out of 12 that there was this failure to oversight the employees who were practicing the discrimination.

MS. DELLAVERSON: But the four gentlemen who had verdicts returned in their favor testified about specific incidents that had happened to them. The jury did not accept the plaintiffs' theory that there was an ongoing daily barrage of discriminatory treatment directed towards them. They found four specific incidents, not wide-ranging, not -- excuse me -- not a wide-ranging pattern or practice of discrimination.

THE COURT: We don't know. I think as to some of

these plaintiffs, the jury found that either Lawrence didn't harass them or, if Lawrence did, it was on such a sporadic basis that there was no reason that Avis knew or should have known about it.

But I believe that balancing the equities here and trying to prevent future racial harassment of the kind proven in this case, given the fact that the evidence was that Avis continues to hire and quite rightly continues to hire Latino drivers, and given the fact that for all that I can see there was no change in the structure of either reporting or investigating the instances of claimed and proven racial harassment, that Avis should be restrained from allowing their employees to harass fellow employees who are Latinos based on ancestry or racial characteristics.

And that will be the order of the court

Mr. Currey, you'll put that in your prohibitory injunction.

MR. CURREY: Yes, I will.

THE COURT: Now, mandatory injunctions. It was my view of the evidence that there were really two problems with respect to the enforcement of the president of Avis's nondiscrimination policy, although it was posted in the lunch room at SF0 Airport.

One has to do with, and I think easier to solve, the lack of communication to the workers who were the subjects of racial discrimination, as to what they can do about it.

And there was a great deal of evidence presented by the defendants in this case of a poster regarding an 800 line, if there were industrial misdeeds, which I thought was a very good idea.

You could post it. But it was an ambiguous poster, and it wasn't directed toward racial discrimination or harassment. It was, in my view, more directed towards petty pilfering and other types of industrial misconduct.

It is my idea that a remedial type of mandatory injunction should require Avis to put up a poster advising employees, both in English and Spanish, that they can complain of racially discriminatory actions on an 800 line similar to the one that was in that poster directed to the Department of Human Resources in New York where Ms. Reilly holds forth.

MS. DELLAVERSON: I'm sorry. I missed –

THE COURT: What's wrong with that?

MS. DELLAVERSON: Before I get to what's wrong with that, I didn't understand what you said.

You mean call that 1-800 number or set up a different 1-800 number?

THE COURT: If that 1-800 number can handle racial discriminations, because the proof in the case was that the employees had that 800 number available at all times for them to complain at.

The poster should say not only complain about industrial pilfering or industrial abuse or whatever, but

target the issue: If you feel that you are being discriminated against based on race or ancestry, you can call this number and complain about it.

MS. DELLAVERSON: In other words, expand the poster to state that it also includes complaints of discrimination. Was that correct?

THE COURT: Right. Right.

MR. CURREY: And in Spanish, Your Honor.

THE COURT: And in Spanish, Spanish and English.

Secondly, I don't see any reason why the EEO poster should not be up in Spanish as well as in English, as well as, third, the DFEH poster that was introduced in evidence.

Now, some points have been made whether the DFEH poster has to be up in Spanish because there's no evidence of 10 percent of the work force being Spanish-speaking and not English-speaking.

The evidence was clear that the employer in this case used Spanish to communicate work instructions and details through Oswaldo Ramirez to the occupants of the Oswaldo Ramirez bus.

Avis knows that it must tell its workers where to go, when to go, what to do in Spanish through Oswaldo Ramirez.

It's my view that nondiscrimination is every bit as important an element of the workplace as what time to show up and what to do.

MS. DELLAVERSON: Permit me to respectfully disagree

with your recollection of the evidence.

That was not the evidence that I recall hearing or putting in or cross-examining on. The evidence was the managers spoke English to the employees quite directly. The evidence was that Oswaldo and the -- Mr. Ramirez and the employees frequently spoke Spanish together at their choice because they chose to speak Spanish at the workplace.

The testimony, as I recall it, also was that virtually every plaintiff was able to speak English to a more or lesser degree, including employees or plaintiffs who had attended college in the United States and high school in the United States.

THE COURT: Some did, and some did not.

Oswaldo Ramirez was a translator and was used as a translator for work orders and for complaints, as Oswaldo Ramirez with Fonseca one time, to complain to Kathy Klopfer, and he was translator.

MS. DELLAVERSON: For the convenience of the employees, Your Honor.

THE COURT: And for the convenience of Kathy Black and Kathy Klopfer.

That's what Oswaldo Ramirez was asked to do time and again; so that, as far as posters, I think that will remedy the informational gaps which will prevent future racial harassment. That is, that will tell the workers what they can do with respect to Avis, with respect to EEO, with respect to DFEH, in Spanish in the

workplace. And I don't think that that's an undue burden on Avis at SF0.

MS. DELLAVERSON: So the -- the -- what you're ordering, rather, is the EEO poster as it exists, not translated into Spanish.

THE COURT: You don't have to translate it into Spanish. You can go to EEO, and they'll give you one.

MS. DELLAVERSON: There's two different things: DFEH, and there's an EEO policy.

THE COURT: There's an EEO poster in red, white, and blue. I've seen it in Spanish.

MS. DELLAVERSON: You said the policy from the--

THE COURT: I'm saying there are three kinds of posters that I want ordered placed at the lunch room at SF0.

MS. DELLAVERSON: Okay.

THE COURT: Number one, a new poster, which will be a variation of the 800-line poster that you have in Spanish and English advising the workers that, if they have a complaint about racial discrimination, they can call this 800 number and that there will be no reprisals for any reporting of such complaints;

Two, that the U.S. Government EEO poster, which is in red, white, and blue and tells them their rights of employment, among which is the right not to be discriminated against, which is a Spanish-language translation of what we had in evidence here, should be posted;

And, three, that the DFEH California State anti-harassment poster, which is in English and Spanish, should be posted.

MS. DELLAVERSON: The federal poster is not in Spanish, is not made in Spanish.

THE COURT: Counsel, let me tell you, you're looking at a person who has posted one in a place of employment under his control.

MS. DELLAVERSON: A federal poster.

THE COURT: A federal poster in Fillmore, California. I've done it. All you have to do is get it from the U.S. Government Printing Office. It's in Spanish. All right?

Now, the more difficult problem is one suggested by the plaintiffs as to a training procedure for supervisors and a complaint procedure in which the court is to order an adoption of the procedure already in use by Avis as to sexual harassment.

I have some real problems with that because I think that that involves the court in micromanagement of a personnel policy which I cannot foresee the unintended consequences of.

And I don't have either the foresight nor the background nor the resources to properly evaluate the plaintiffs' request on that issue.

MR. CURREY: Well, Your Honor, may I make a suggestion on that?

I think that the court's order to post is adequate for present employees who are probably aware of

this action. But if in the hiring process a document is handed out to the new employees, if the court orders that, then they're aware from the time that they come to work that the procedure that the court has ordered is available to them.

And so I think that in the sense that it's remedial and prospective as to prohibit future conduct as opposed to ordering a procedure, if the court would order that the 800 number, whatever the final format of that is, is handed out to Spanish-speaking employees -- and they can determine who is Spanish-speaking -- I think that would cover it without the court getting into the detail that the court is concerned about.

THE COURT: Well, what I was going to do is, the second problem is why there was no resolution of these complaints at the employer's was that there was a lack of clarity as to just what the supervisors should do, what the workers should do to complain about racial and ancestral harassment.

And I think that once the workers know who they can complain to in the company if they have this kind of a problem and the supervisors know what their responsibility is to investigate, determine whether it exists, take disciplinary action if it's necessary, and guarantee that the complainant will not have fear of reprisal, that problem will be ameliorated, and the substantial likelihood of a repeat of this case will be decreased.

So what I'm thinking of is requesting that the

defendants in this case within a reasonable time -- say 10 days, or if they need longer, do so -- submit to the court a written form of instructions to workers and supervisors regarding how and where the workers should complain to Avis personnel regarding harassment because of racial or ancestral biases. And how the supervisors should react to it without adopting all the procedures of the sexual-harassment policy and also, taking up on what Mr. Currey said, some procedure for having these instructions disseminated to workers and to supervisors.

Perhaps we had some evidence of minutes of meetings which were given to workers along with their paychecks. There was a name for those meetings which escapes me at the present time. And it may be this simple: That you give instructions to workers. If you have a complaint about racial discrimination, bring it up at one of these meetings; and supervisors investigate, mediate if necessary, discipline if necessary, and report it to Human Relations in New York or at the regional level.

I don't know enough about the organization to do that. But it seems to me that, once the posters are up, we've taken the first step in advising workers how to complain if this situation recurs. And we've advised supervisors what they can expect if they allow this situation to occur.

Now we have to go to the next step, which is to inform the workers and supervisors of the precise steps

they ought to take in-house to prevent recurrence of racial discrimination. But I don't want to try my hand at drafting a management policy without giving the defendants an opportunity to do so with the knowledge of what tools they have at their disposal.

So the order of the court as to the mandatory injunction requiring training of supervisors or adoption of a racial—harassment policy similar to the sexual-harassment policy, that portion of plaintiffs' request is denied without prejudice to being renewed. And the defendant is given -- let's say, 30 days -- 30 days to propose a plan by which workers and supervisors will be advised of the company policy in written form, how they're supposed to complain; and as to supervisors, what actions the supervisor should take to remedy the complaints.

MS. DELLAVERSON: Are you saying as to complaints of national-origin harassment at the San Francisco Airport location?

THE COURT: Right. That's all we're dealing with. I mean, that's all that Mr. Currey's asking for.

Right?

MR. CURREY: That's correct.

MS. DELLAVERSON: You're talking about a huge company with a lot of prohibitive factors in terms of discrimination.

Are we talking about carving out a separate complaint procedure for --

THE COURT: I have to presume innocence as to every

other installation of Avis. So this only has to do with SF0 Airport. And that's all that Mr. Currey is asking for; so that, if there's a way to do it only at SF0 Airport, I think it would be probably more economic to do it.

But you folks know what levers to pull and what structures to use that would best accomplish this purpose. And I think in 30 days you can come back with an English-Spanish instruction form: If you think you've been discriminated against, who to complain to, what to expect. And: Supervisors, if you get a complaint, this is what you should do.

MR. KELLY: Your Honor, may I be heard briefly?

THE COURT: Sure.

MR. KELLY: In all the cases we've looked at, Title VII cases or commission cases, the relief is not -- to use a term the court used a lot, it's not in a vacuum. It was specifically as to the plaintiff.

THE COURT: Right.

MR. KELLY: Here it is stipulated, I think, that, at least with respect to those three or four people who were victims of anything other than that single incident that occurred in 1991, there's only one person left. It's Mr. Mojica. The type of relief that the court is talking about here, postings, though the court has denied that it is requiring a policy, it has talked about an 800 number which would advise employees of their complaint rights. It is in effect requiring policy. Those are not

targeted to Mr. Mojica.

THE COURT: I'm not requiring a policy as to the 800 number. Your policy written by Mr. -- I can't remember his name, whatever his name is -- that policy is in English and Spanish: And if you think that this has been violated, call the 800 number. That's what I'm saying.

I'm not saying a policy. I'm saying that you must communicate that Avis has an anti-discrimination policy which was trumpeted by every Avis witness.

You haven't communicated to these people. You haven't told them where to complain of it. That's what I'm trying to solve.

Secondly, the jury found that Avis supervisors were not enforcing this policy properly as to these four plaintiffs. And there's nothing in the evidence which indicates to me that future Latino hires will be treated any differently.

MR. KELLY: That's my point, Your Honor. In the cases that have been provided by both sides, to the extent the courts have granted equitable relief in anything other than the class action -- one of the cases cited by plaintiff was the Williams case. It went on 15 years in the world, and it was because of grievance -- I think segregated unions.

We're dealing with the evidence presented here. And the only person who can conceivably profit from anything the court's been talking about during the last hour is Mr. Mojica. So we're talking about relief toward

him.

He is the only party before the court. Anyone who comes in the future is not properly before the court. And I would submit that, to the extent the court is inclined to think along the lines that we've been talking about, the relief has to be tailored to the parties who are properly here --

THE COURT: Counsel, you forget that there was a lot of evidence that people left Avis employment and then came back for Avis employment time and again. If they were fired, they were rehired --

MR. KELLY: They are not --

THE COURT: -- to stop these plaintiffs from resigning up --

MS. DELLAVERSON: They were all union employees. Mr. Tarty testified, every single, solitary person who testified that they had come and gone --

THE COURT: They have the union make sure that they got rehired.

Well, counsel, as I read the cases, if you have an identifiable group of people who have been discriminated against and that creates a substantial likelihood that the similar type of people will be discriminated against, you can enjoin the employer from discriminating against them; and then you can tailor what remedies are necessary to insure that.

MR. KELLY: Those are pattern-practice cases, class-action cases, disparate-impact cases where the

impact was still in place at the time of an appeal, five years after the verdict was handed down.

We're dealing here, I think, with Mr. Lawrence's conduct. That's the only thing we've been talking about during the course of the hearing.

THE COURT: Well, Miss Black's conduct resulted in eight plaintiffs' verdicts for $15,000.

MR. KELLY: That's an incident that occurred August 11, 1991 that we've heard from over 11 witnesses that I'm not going to talk about today.

She's no longer there. We have sustained our burden. She's not going to engage in this conduct. She has no interaction with the plaintiff. The court is limited to tailoring its equitable relief to the plaintiff. In the Inyo County case Shriver and Peralta, the court is talking about relief that ought to be given to the complainant.

THE COURT: Your point is, if Mr. Mojica had decided before today to abandon his employment at Avis, then there could be no equitable relief, period?

MR. KELLY: If Mr. Mojica, like some of the others, were terminated, all the termination cases were decided in favor of Avis, or quit, the relief could not possibly benefit any of the plaintiffs because they have no stake in the action. As to them, it is moot.

THE COURT: But there was some specific language in Peralta contrary to that.

MR. KELLY: But in Peralta there were plaintiffs who

were benefited by the relief.

THE COURT: He's going to be benefited by the relief. Mojica will be benefited, and there will be other persons, but similarly placed to Mojica, who will be benefited.

The circumstances are the same. They're still hiring Latinos. They still have the same practices in place. And those practices are the ones that I would like to change to make sure that we don't have another lawsuit similar to this.

I think that that is within my equitable jurisdiction.

MS. DELLAVERSON: What practices, Your Honor? The complaints were that John Lawrence engaged in certain practices.

THE COURT: You're never going to have another John Lawrence? You already have another John Lawrence on the property.

Avis's liability is for failing to control Lawrence. There's no respondeat-superior liability for Lawrence. There is for Black, but not for Lawrence.

And you haven't in place the mechanism which controls Lawrence. That's what the jury found.

You knew or should have known that Lawrence was racially harassing these four Latinos. You didn't prevent that. What I'm charged with is the duty of making sure or trying to make sure that it doesn't happen again

because a substantial likelihood that Lawrence, who's still on the job, or some other Lawrence may do it, given the structures and given the work force and how you manage people out there in the work site. That's all.

MS. DELLAVERSON: How --

THE COURT: It's very simple. I don't think that the burden which I'm putting on you folks is that difficult. I'm telling you not to discriminate.

You said you never did, never would; so you don't have to worry about it. "Lawrence, don't discriminate." He says he won't do it again. Fine.

MS. DELLAVERSON: Your Honor.

THE COURT: Posters, three; and some type of program, which I leave to you, to inform the Latino workers in Spanish and English of their rights under Avis policy to complain and where to complain.

Now, I don't think that that is such a burden. Why is that such a burden?

MS. DELLAVERSON: May I speak?

The obligation is on every employer in this state, in this country, not to discriminate. It already exists.

Let's not pretend that what you're doing is not a big deal, because it is. Entering an injunction against an employer is a big deal. All right? It is not just a minor -- a minor occurrence. It is an injunction. It is important. They will have to -- that's a disclosable event, that there is an injunction that is in place. It

is a very major deal in my mind.

THE COURT: I'm not saying it's not a major deal.

MS. DELLAVERSON: You're saying it's not a big burden.

THE COURT: The burden of the provisions of the injunction is not out of proportion to the problem that the jury have found to exist.

MS. DELLAVERSON: I am not saying that --

THE COURT: And by the way, every employer in the country should not discriminate, that's true. But the jury found that Avis did.

MS. DELLAVERSON: In four isolated incidents.

We were here for a real long time. I'm sure everybody sitting in this courtroom could remember with different emotions, but we all remember it well; the jury --

I'm sorry, Your Honor. From where I was sitting, from where I saw the jury verdicts, they did not buy the plaintiffs' theory of the case except for a very small part of it. They did not find that Avis and John Lawrence engaged in a pattern and practice of discrimination against the 12 plaintiffs. They found -- they found that eight of them were in the lunchroom during the call-later incident. They didn't like that incident. That was it for those --

THE COURT: Mr. Currey only hit 333; but these days that's a big number.

MS. DELLAVERSON: I believe you said you weren't

going to require Avis to do a sexual-harassment policy basically. And I'm not sure I understand the distinction --

THE COURT: I'm giving you an opportunity to come up with something more simple than a sexual-harassment policy because I understand the two interests are different. But there has to be something which tells people like Mojica and people like Peraza and people like Recinos that Avis has a policy against racial discrimination: If you feel that you've been racially discriminated against, this is who is there to complain to. And if you're not satisfied, here's who you should complain to.

That's all I'm talking about. And you should tell your supervisor when a complaint is made you're charged with the duty of investigating it and taking remedial action if justified.

It's that simple. But it should be done because that will, I think, prevent the type of actions of which there is a substantial likelihood there will be repetition with Lawrence on the job and with the type of people that you have coming to work for you.

MS. DELAVERSON: Again, I would point out, the evidence was that every person -- they all testified, all of them testified, that they did complain. There was not a failure of communication in terms of complaining. They all testified at trial, although they didn't before trial, that they did complain about the harassment.

THE COURT: And four of them complained enough to

have Avis know; and nothing happened to prevent it.

You see, we're going around and around on what the evidence is.

Eight out of 12 did not get jury verdicts; but four did. That's substantial enough to --

MS. DELLAVERSON: Of whom one still works there. We still get back to this same point. One of these men still works there.

THE COURT: That's right.

MS. DELLAVERSON: This is not a case by the commission; this is not an EEOC case. This is not the EEOC acting in place of the Attorney General or the DFEH in this state. This is a case of 17 people who brought a lawsuit saying -- 17 separate lawsuits -- remember, this was a combined lawsuit -- saying "I was discriminated against" or "I was wrongfully terminated."

If we had been in this court, like I asked for 1800 times -- but if we had been in this court with one of these people one at a time complaining, okay; if this had been a wrongful-discharge suit of one person, another, another person, we wouldn't be sitting here doing this today.

THE COURT: Not necessarily. If there had been three single cases -- because Fonseca didn't prove any cases if there had been three single cases and they had been found to be entitled to $25,000 apiece, you might well be here again.

Alright, counsel, would you please prepare an

order along the lines indicated.

MR. CURREY: I will.

THE COURT: And you have 30 days to provide a form of mandatory injunction with respect to the last element which I've told you about. And what I'd like you to do is to submit it after 30 days to the plaintiff for any changes. And you have 15 days to make any changes or suggestions. And then submit it to me along with the rest of the injunction.

MR. CURREY: Right, Your Honor.

THE COURT: And then I will act on it.

MR. CURREY: I understand.

THE COURT: Now, are you going to move for costs, memorandum of costs?

MR. CURREY: Yes, I am.

THE COURT: Can we get a date on that, or do you want to go back to your offices and check that?

MS. DELLAVERSON: Judgments have not been entered yet, because that triggers the time running for --

THE COURT: Well, that's true. That's why I want to enter judgment 45 days from today, which gives you folks the time to put together the last element of the injunction and you time to criticize it and propose other language.

MR. CURREY: Correct.

THE COURT: And then based on that, I will simply adopt what I think is correct and sign the judgment that will be entered 45 days from today.

MR. CURREY: Yes.

THE COURT: That will be somewhere around the end of January.

MR. KELLY: If we have 30 days and Mr. Currey has 15, you're not going to have sufficient time if you want to enter judgment 45 days from today.

THE COURT: Well, that's true. I'll do it when I can.

So are there any time limitations on my entry of judgment? I don't think so.

MR. CURREY: I don't think so, Your Honor.

MS. DELLAVERSON: Not that I'm aware of.

THE COURT: When I have that, I'll get to work and do it. All right?

MS. DELLAVERSON: So you want costs and disbursement --

THE COURT: After the entry of judgment.

MR. CURREY: After judgment is entered. Correct.

THE COURT: Thank you very much.

Court's adjourned.

---000----

STATE OF CALIFORNIA)
) SS
CITY AND COUNTY OF SAN FRANCISCO)

I, KERY GILLET, Certified Shorthand Reporter, do hereby certify:

That I am the Reporter, duly appointed and sworn, who reported the above and foregoing proceedings at the time and place therein stated;

That I reported the said proceedings; and that the foregoing pages are a full, true, complete and correct transcript of my shorthand notes taken at said time and place to the best of my ability.

Dated: December 21, 1994

_____

Kery Gillet, CSR No. 3352

Official Court Reporter

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO
BEFORE THE HONORABLE CARLOS BEA, JUDGE
DEPARTMENT NO. 16

OSCAR AGUILAR, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 948597
	)	
AVIS, INC., ET AL.,	)	
	)	
Defendants.	)	
	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
POST-TRIAL MOTIONS
FEBRUARY 6, 1995

APPEARANCES:

FOR THE PLAINTIFF(S):

BRONSON, BRONSON & MC KINNON
BY: EDWIN L. CURREY, ESQ.
505 MONTGOMERY
SAN FRANCISCO, CA 94111
(415) 986-4200

FOR THE DEFENDANT(S):

MC KENNA & CUNEO
BY: JOANNE DELLAVERSON, ESQ.
-AND-
DONNA M. RUTTER, ESQ.
-AND-
JOEL P. KELLY, ESQ.
STEUART STREET TOWER
ONE MARKET PLAZA
SAN FRANCISCO, CA 94105
(415) 267-4000

OFFICIAL COURT REPORTER:

KERY GILLET
C.S.R. NO. 3352

FEBRUARY 6, 1995
---000---

THE CLERK: This is the matter of Oscar Aguilar, Carlos Benavides.

THE COURT: Say, et al.

THE CLERK: Et al.

THE COURT: Versus Avis, et al., number 948597. Appearances for the record.

THE CLERK: Order setting hearing on parties' proposed judgment on permanent injunctions.

MR. CURREY: E. L. Currey, Jr., Al Bedecarre, and Renee Saucedo for the plaintiffs.

MS. DELLAVERSON: JoAnne Dellaverson and Donna Rudder for defendants.

THE COURT: All right. This is on for final form of entry of judgment which includes equitable relief.

And I worked on that over the weekend, and I've given copies to the parties. And I've taken from both of them.

And let me tell you, as we go down, the determinations that I've made of the substance that have gone into the form of judgment. And I'll invite any comment you have.

Number one, Niguel Fonseca is not a prevailing plaintiff. And the reason for that is this: I believe that damage is an essential cause of action under 129450 of the Government Code and that one cannot be the victim of a legally cognizable harassment unless one has been

damaged. It's a fancy way of saying no harm, no foul.

As to the equitable relief, I take the point made by the defendants that an injunction enjoining a breach of the law and that kind of language usurps the function of the Department of Fair Employment and Housing and is too broad and vague.

And so I went back upon my notes and found out just what it was that Lawrence did that caused the jury to find that he harassed the plaintiffs.

And all I could find were two discrete types of acts. One was derogatory, racial, or ethnic epithets and, two, touching. And so that's what I put down in paragraph 13.

And then as to Defendant Avis Rent-A-Car, again narrowing the scope of the permanent injunction, that they not allow Lawrence to commit any of the acts described in paragraph 13 because there was no evidence of any continuing harassment or discriminatory action by persons other than Lawrence; so there was no reason to enjoin Avis in allowing other employees to do similar things.

And then the only other act which was found to be discriminatory seemed to be the computer chase-down, and that involved one supervisor. But it involved the type of investigation which targeted on Hispanic-Latino employees in that capacity. And I attempted to state that that should not be done again. And that was prohibited, in other words investigations where they investigate only Hispanics and Latinos, not Filipinos, not Blacks, not

Whites, et cetera, where other persons, such as the evidence showed in this case, were in the area where they could have gotten the computer with ease and were not investigated.

Then, lastly, penultimately, I went into the posters.

As far as the business-abuse poster, I used my own knowledge of the Spanish language to change it and gave you a text which I think brings it home a little bit better. And it's idiomatically more correct.

And as far as the EEO and DFEH posters, they're printed and available.

And as far as the policy statement, I took from both parties some suggestions.

I probably made it substantially less broad than the plaintiffs suggested. I eliminated the requirement that the network -- I don't know who --

MS. DELLAVERSON: Are you borrowing from Judge Ito - -

THE COURT: I am not borrowing any evidentiary rulings from Judge Ito.

Come on in, Janet. Are you through up there?

My feeling was this: On the memorandum regarding discrimination, number one, it ought to be clearly identified for employees and managers.

Number two, it ought to be a Davis discrimination policy and lay out procedures for complaints.

Number three, although the workers should be

informed of their rights in Spanish so that the consciousness of their rights may be made known to them, they'll have to find out their own ways by which to complain on the network. And if they have Spanish-speaking people, fine. If they don't, that's fine too.

I'm not going to impose a Spanish-speaking answering service on the network.

You see it, what changes I've made. I borrowed from both. All right.

So why don't we allow the plaintiffs to criticize the judgment and direct me to the page and line number or page and paragraph number, as I think you would.

MR. CURREY: Not too many, Your Honor, but a few. Obviously, just a few.

In regard to the business-abuse poster, there have been some changes on there that I think are very good. But it doesn't mention race or national origin anywhere on the poster.

In a sense, the gravamen of the Complaint is race or national origin. "Discrimination" should somehow be put on the poster.

THE COURT: Well, if we start talking about subparts of discriminatory, we've got to do race, ethnic, age, sex, sexual orientation, gender. I mean, of course all those things aren't in this case, are they? So you'd want to have something like "racially discriminatory"?

MR. CURREY: Well, without rewriting the entire

poster, you could put "illegal, unethical, or irresponsible activity or any discriminatory actions prohibited by law." And that gives some clue that it's separate from just pure business practices.

And that does cover the whole gamut. At least it gives some indication that - - that discrimination is separate from the illegal, unethical, or what-have-you activity that - -

And also harassment is a - - is a form of discrimination. And I think that since this was a, and from our point of view, a harassment case, there should be some reference to harassment.

THE COURT: How do you feel about that, counsel?

MS. DELLAVERSON: All of it?

THE COURT: All of the above.

MS. DELLAVERSON: Well, to the -- I believe what the court ordered in the hearing we were at is that the business-abuse poster be modified to add the word "discriminatory," which is what of course we did.

It already puts people on notice that they can use this hot line to complain of illegal activity, which is what Mr. Currey's mentioned, illegal activity, discriminatory activity. This is in addition to the EEOC poster, the F.H.A. poster that's filed, the new poster that we're putting up. I think we're machine-gunning this thing when it's not necessary.

THE COURT: I think "discriminatory" is sufficient in

view of all the other remedies and because discriminatory brings to mind most readily racial and ethnic discrimination; so - -

MR. CURREY: Your Honor, Mr. Bedecarre's pointed out: I think you have ordered "harassing" in your order, which I think covers it.

THE COURT: Not in Spanish. Well - -

MR. CURREY: It's page 7, paragraph 15.

THE COURT: Of the order?

MR. CURREY: Of your draft order, yes, Your Honor. You know, that's –

THE COURT: "Unethical, discriminatory."

MR. CURREY: But your next word is "harassing."

THE COURT: "Harassing."

MR. CURREY: And I think that - - that's enough. But we'd kind of like that in Spanish.

THE COURT: Hostigamiento, H-O-S-T-I-G-A-M-I-E-N-T-O

MS. DELLAVERSON: Your Honor - -

THE COURT: Let me just -- (Writing.) Hostigatorias.

MS. SAUCEDO: Hostigamiento would be better, Your Honor.

THE COURT: You're asking for the adjective there, not the noun.

Madam clerk?

THE CLERK: Yes.

THE COURT: Never mind.

(Reading.) H-O-S-T-I-G-A-T-O-R-I-O, hostigatorio.

MS. DELLAVERSON: Would you say that again.

THE COURT: H-O-S-T-I-G-A-T-O-R-I-O-S, hostigatorios, which is the adjective for "harassing."

MS. DELLAVERSON: Your Honor, there are handwritten notes on the mockup we submitted on the business-abuse hot line. And the -- in Spanish, the Spanish portion. The typed notes on the next page are not the same.

Are the typed notes the ones you want - -

THE COURT: Yes. The typed notes are the ones that should go in there. And I put hostigatorios in there right by, D-I-S-C-R-I-M-I-N-A-T-O-R-I-A-S, discriminatorias.

MS. DELLAVERSON: Yes.

THE COURT: All right. Next. Plaintiff.

MR. CURREY: With regard to Mr. Fonseca, Your Honor, I think that the statute in which we asked for this relief says that if no appreciable damage is inflicted upon the plaintiff, they may still be entitled to judgment on their behalf.

And I would suggest to the court that the jury instruction was there had to be no severe emotional distress. It doesn't mean nothing happened. And so I would suggest to the court that being the victim of discrimination when Avis knew or should have known about Lawrence should have given Fonseca nominal damages for injunctive relief.

He was a plaintiff for that subject. And there's a difference between saying no damage and the

statute which says no appreciable damage. He still may be entitled to injunctive relief.

So we suggest to the court it's not no harm, no foul. There has been harm here. But it's not severe emotional distress that was on the jury verdict.

I think Mr. Fonseca is entitled to nominal damages of one dollar because of the conduct of Avis and as a prevailing party on injunctive relief because he was harassed by Lawrence and Avis should have known about it, short and quick.

THE COURT: I want to make clear on the record that I read the statute as saying there is appreciable damage only where there is a common-law tort damage, to wit, severe emotional distress.

If you don't get over the severe emotional distress threshold, you don't have any appreciable damage; you haven't made out an element of the statutory tort.

Thank you, but I'm just going to stick by my proposed injunction.

MR. CURREY: Yes.

THE COURT: Next?

MR. CURREY: I think - - is this our final?

(Conference between plaintiff counsel.)

MR. CURREY: I think it is for me, but maybe - - my final suggestion, Your Honor, is the court made - - made it clear, I believe, at the hearing that Avis had to take some responsibility for the behavior of its supervisors.

And it was not just Lawrence. There was Kathy

Black. Admittedly there was no evidence of continuing violation by Black. But the point is, the heart of it is that there was not a procedure that was effective to communicate to the Hispanic employees about the nature of the harm that we protested.

So I think it's appropriate under those circumstances to enjoin Avis itself to cease and desist from violating, from discriminating, or harassing Latino employees.

That's the long and the short of it.

THE COURT: Well, I think the equitable remedy is fashioned to take three concrete steps towards communication to employees, how they can pursue any complaints, and also to make the race- and national-origin discrimination policy brought home to all managers.

They have to sign the receipts; and the records have to be kept for the receipt of the discriminatory policies.

I think that that's the type of remedy we need from now on. And, remember, that the only direct supervisory discrimination was the - - found was the investigation discrimination on the missing computer. And that, of course, weighed on me.

All right. So no changes other than hostigatorio in the Spanish-language poster and putting in the word "harassing" in Exhibit 1.

How about you, defendants?

MS. DELLAVERSON: Yes, sir.

Preliminarily, again, I would renew our request that the verdicts be - -

Can you hear me or –

THE COURT: Turn it on and -- yes, right.

You don't mean the verdict. You mean the judgment.

MS. DELLAVERSON: Yes, I'm sorry. Yes. Thank you.

Preliminarily, we would ask that the judgments be entered separately. And it's simply confusing in the way that the plaintiffs propose. There's no error in it that I could see quickly. But it's just confusing.

The jury's special verdicts were submitted separately to the jury. They filled them out separately. And it's going to be -- it's just difficult to figure out who got what when you -- when you read this and what the jury found as to each person. I don't --

THE COURT: In what way?

MS. DELLAVERSON: I beg your pardon?

THE COURT: In what way?

MS. DELLAVERSON: Well, when I read it, I had to go back - - I had to pull out the jury verdicts they filled out to collect and make sure that this was accurate in terms of what the jury - - in terms of what the jury found out.

THE COURT: Are there any inaccuracies?

MS. DELLAVERSON: No.

THE COURT: We have 15 cases. And it seemed the best way to do it. You want specific findings of each fact

that they're entitled to, to be found based on the jury verdict. Okay?

What else?

MS. DELLAVERSON: As to the equitable relief, Your Honor, going to page 6 ....

THE COURT: 6. Okay.

MS. DELLAVERSON: I don't have line numbers on mine.

THE COURT: Okay. Paragraph?

MS. DELLAVERSON: Paragraph 13.

THE COURT: Right.

MS. DELLAVERSON: And I appreciate, obviously, an attempt at narrowing the injunction to tailoring it to the evidence that was educed at trial.

The problem I have with what is written, as I read this injunction, Mr. Lawrence is being prohibited from speaking, from using words, from talking, which I believe is inappropriate, an inappropriate infringement on his free-speech rights.

As to an injunction, the effect of this is putting a person at risk of going to jail on the basis of words that are spoken.

THE COURT: Sure. What's wrong with that?

MS. DELLAVERSON: I think that's an infringement of his free-speech rights, as well as California Civil Code 52.1, which specifically says you cannot enjoin free speech unless it's a subject of violence.

You're talking about not filing a charge, not having a trial, not having damages awarded. But the --

the import of this is that a person is at risk of going to jail on the basis of words being spoken.

I think that's precisely what no one in this country is subject to.

THE COURT: The First Amendment right to continue to incur civil liability.

MS. DELLAVERSON: He can be sued, obviously, for whatever he says. That's certainly the subject of - - of - -

THE COURT: How do you avoid repetitive torts, which is a subject of equity jurisdiction?

MS. DELLAVERSON: I think - -

THE COURT: You can't do it if it happens to be a speech?

MS. DELLAVERSON: I don't think you can enjoin free speech. I think that's an overriding factor. I don't think a person can be subject to a jail term for what they say as long as what they're saying is not inciting violence.

I mean, there are many -- I didn't know we were going to get to this; so I didn't grieve it. But my recollection is there are many supreme-court cases which involve people using foul language which is protected speech in this country which is - -

THE COURT: Aren't these fighting words and fighting touchings?

MS. DELLAVERSON: No, Your Honor. There was no testimony he was inciting these people to violence. He

wasn't saying kill the F'ing this and that.

THE COURT: Aren't these words such that one can expect them to lead to violence if used over and over again?

But they haven't led to violence, have they?

MS. DELLAVERSON: Right.

THE COURT: Because of his position and their position. I hadn't given that any thought.

It seems to me that where the use of derogatory racial epithets is a violation of law, it's a repetitive tort.

Are you saying that the political content included in the slur, normatively deprecated as it is by the statute, still is entitled to constitutional protection?

MS. DELLAVERSON: I'm saying any free speech that is short of inciting people to violence is protected free speech, whether he says, "I think Bill Clinton is an idiot," whether he says -- you cannot go to jail in this country for what he says.

THE COURT: Mr. Clinton might give you an argument on that and say it might say it's providing a hostile working environment. It doesn't have any racial or ethnic content to it.

Here's what's happening is he is saying things which are prohibited by the statute because of the effect that they have on the working place.

MS. DELLAVERSON: And there is a remedy provided for

that - - in the statute which is, if he were to do that, he would be subject to a charge of discrimination. There would be a trial.

There is a civil remedy for that. It's not a criminal - - there's no criminal remedy for under - - in the statute provided at all.

MR. CURREY: Your Honor, a simple answer to that is that the defense continues and persists in calling this a criminal proceeding - - contempt a criminal proceeding.

It isn't a criminal proceeding. It is a civil proceeding. If you look at the case, criminal contempt is only direct contempt, basically, in the presence of the court that interferes with the operations of the court.

Civil contempt is contempt of an order. And the remedies that are persistently called criminal are not defined by the supreme court as criminal. They're defined as civil.

There's no inhibition upon the court for issuing such an order which enjoins specifically acts that have been found to be illegal by the jury and where there's a probability they will continue.

This is an authorized statutory remedy. If the supreme court can affirm an order by the department to cease and desist from discrimination and harassment, the court can issue an order against a tort-feasor or a malefactor, if you will, to stop the conduct that the jury found objectionable.

So I think all this talk about criminal

liability is completely misplaced. The cases don't support that. It's just a red herring.

THE COURT: He would be entitled to a jury trial unless he happened to be in the courtroom with one of these employees and would use an epithet in view of the court, which I greatly doubt will happen.

This would be an indirect contempt; and he'd be entitled to a jury trial. At which time he can raise any First Amendment rights that he may have.

MR. CURREY: That's my second argument, is that it's premature. This argument is all premature.

The purpose of the injunction is coercive, not criminal. And there are remedies less - - there's remedies that can be imposed that I think are lesser than going to jail, as the defense keeps insisting. I think that argument is premature.

THE COURT: I think you raised a valid question Miss Dellaverson. But I think it's something that can be dealt with on an order to show cause why there shouldn't be contempt. And I think he'll be entitled to a jury trial at that time. So that I think it is premature.

Anything else?

MS. DELLAVERSON: Yes. If I could just direct your attention to Civil Code 52.1(k), which is entitled Injunctive Relief in an Action for Interference with Enjoyment of Rights, Interfering with a Person's Rights to Enjoy the Laws in the State of California, Section K:

No order issued in any

proceeding under Subdivision A or B shall restrict the content of any person's speech, period.

MR. CURREY: I don't think the order is issued pursuant to those subdivisions. It's 12569(c) which gives the court the authority to grant that type of relief. And, B, in addition, any other relief that, in the judgment of the court, will - -

The purpose of the law is to prevent harassment. It's nice to talk about the very broad Civil Code - - CCP sections; but this is a specific statute. And when we briefed in our application the purpose of it is to prevent harassment and it's not - -

In my understanding, it's not being issued pursuant to Section 51.

MS. DELLAVERSON: Well - -

THE COURT: Anything else?

MS. DELLAVERSON: Yes. Again C.C.P. 1218 specifically does provide for criminal - - for imprisonment and for a fine, imprisonment not exceeding five days, or both.

And Your Honor specifically pointed that out, I recall, at a hearing we had earlier. It was not in front of you. You wanted them to understand, if it happened again, they're going to jail.

THE COURT: It's indirect contempt. And he's going to a jury trial before he's adjudicated of the contempt.

MS. DELLAVERSON: I hope that is true.

The answer is, upon evidence taken, the court or judge must decide, if adjudged guilty - - may go to jail, basically. Obviously there has to be a hearing on it.

THE COURT: And the plaintiffs at that time may wish not to proceed by contempt and proceed by a regular DFEH complaint and, thereafter, by civil action and procure a more-than-$1,000 fine levied against them, which wouldn't go to them anyway.

Okay. Anything else?

MS. DELLAVERSON: Yes. The second part of the injunction says that Mr. Lawrence refrain from any uninvited touching.

THE COURT; Yes.

MS. DELLAVERSON: There is no requirement that it be purposeful touching, that there be an intent to harm.

An uninvited touching could be bumping into someone which would subject us to criminal contempt proceedings.

There's no requirement here that it be offensive, that it be with the intent to harm, that it be purposeful. Anything can be an uninvited - -

THE COURT: You mean it could be an accidental bumping. Right.

MS. DELLAVERSON: Yes.

THE COURT: I think that it should be uninvited, intentional touching.

MR. CURREY: Fine.

MS. DELLAVERSON: I think it should be with the purpose or intent to harm.

THE COURT: No. Because you'll remember that one of these gentlemen - - I think it was Mr. Recinos - - said that he would come along and pop these fellows on the back. And he may not have intended to harm, but it sure didn't help them.

So uninvited, intentional. I'll put the word "intentional" in there.

Okay. Anything else?

MS. DELLAVERSON: And you broadened it to the State of California rather than the San Francisco Airport location, which is - -

THE COURT: Yes, because I think the evidence here is sufficient that indicates that this man repeatedly harassed Latinos. And to avoid a multiplicity of torts, I don't want him doing that in Hayward or Oakland or in Santa Barbara.

MS. DELLAVERSON: Well, I take issue with your statement that he repeatedly harassed Latinos because that's not what the jury found.

THE COURT: They have $75,000. That's repeatedly.

MS. DELLAVERSON: Three people.

THE COURT: Okay. Anything else?

MS. DELLAVERSON: On the next page, 7; page 7.

MR. CURREY: 7.

MS. DELLAVERSON: Paragraph 14.

THE COURT: Yes.

MS. DELLAVERSON: It reads that defendant shall "cease and desist from allowing."

Again, there's no requirement that they know about it, that it - - the law states that employers must know or should have known about the conduct to be liable for it.

It should at least say from "knowingly allowing."

THE COURT: Well, it's not knowingly. It's knowingly or under circumstances which a reasonable person should know.

That I think is implicit in the term "allowing."

MS. DELLAVERSON: Well, it wasn't -- I don't think it's -- it's as obvious as you do, that "allowing."

THE COURT: You want the word "knowingly."

MS. DELLAVERSON: Yes.

MR. CURREY: I think it requires "should have known" in their summary, Your Honor.

THE COURT: It's going to be awkward. "Shall cease and desist, comma, with knowledge or reason to know, comma."

It's very difficult to put in there.

MS. DELLAVERSON: Well, I could suggest - - I mean, that's because the - - the concept doesn't fit itself to an injunction. We're putting a square peg in a round hole.

There is an avenue for redress if Avis knows or should have known of discriminatory conduct.

THE COURT: Counsel, you've lost me on that one.

I'll give you the language you want if you give it to me.

MS. DELLAVERSON: "Shall cease and desist from allowing defendant," blah, blah, blah, "if it knows or should have known of the conduct."

MR. CURREY: And I think we can do it by breaking it into two sentences, Your Honor. After - -

THE COURT: "Cease and desist from allowing defendant Lawrence from committing any of the acts described in paragraph 13."

MR. CURREY: "Under circumstances - - under circumstances in which they knew or should have known of such actions."

And then a new sentence, I think, clears up the verbal difficulty.

THE COURT: "Under circumstances of knowingly" - -no. "With knowledge."

MR. CURREY: "Under circumstances in which they knew or should have known of such acts."

THE COURT: "Under circumstances under which" –

MR. CURREY: Yes. Or "under which they knew or should have known of such acts."

THE COURT: "They knew or should have known." (Writing.)

MR. CURREY: And then, Your Honor, just say "period, and, further, Avis" - -

THE COURT: I'll put a semicolon there.

MR. CURREY: Yes. Okay.

THE COURT: "Under circumstances in which they knew or should have known of such acts." (Writing.)

All right. "Semicolon." Okay.

Next.

MS. DELLAVERSON: The rest of paragraph 14, sir, again there was one instance of there being an investigation that the jury found objectionable, in fact it was only one instance of an investigation that was put on at trial.

There is no evidence whatsoever of this being an ongoing procedure that requires an injunction. This was not a pattern or practice at Avis. It was one isolated event that happened in 1991.

So, A, I would argue - - I would ask the court to reconsider its ruling in this area on the basis that the evidence is simply not sufficient to give rise to an injunction that it's ongoing; and, B, the way that it's worded is going to be very difficult to implement in terms of what is an investigation, a breach of an employment rule or practice. It can be a very trivial event. "Why did you ask me that?" "Why am I being asked to open the hood?"

It's a very broad -- broadly worded injunction. I think it's going to be very difficult to implement.

MR. CURREY: It's very straightforward, Your Honor.

THE COURT: It involved eight persons, not one person.

MS. DELLAVERSON: Right.

THE COURT: It was one incident that involved eight persons who got relief. There may have been more people there.

All right. I'm going to leave it the way it is.

Anything further?

MS. DELLAVERSON: All right. And on the poster, it's the typed version in Spanish that we should follow, not the handwritten notes, right?

THE COURT: Right.

MR. CURREY: With one addition.

MS. DELLAVERSON: Right. I have that.

THE COURT: The English edition, after the word "discriminatory," is "harassing." And then the Spanish language is on the typed page Exhibit lA.

MS. DELLAVERSON: Right. Got it.

THE COURT: All right?

MS. DELLAVERSON: On paragraph 16?

THE COURT: All right.

MS. DELLAVERSON: Paragraph 16 goes on to page 8. And the court has ordered that the policy statement be posted in conspicuous places, which seems to me to be vague, as I - -

THE COURT: I thought I had something in there.

You're right. Conspicuous places limited to employee entry; in other words, that I don't want them posted at the counter where clients are coming up to them

saying, "What's this." Right?

MS. DELLAVERSON: We requested it being the employee lunchroom where the employees gather.

MR. BEDECARRE: Al Bedecarre.

Your Honor, there was some testimony at trial, I thought, that some employees in the airport punched in at a different location than the check-in lot. And that is what we were trying to address here.

There may be employees who don't go through the lunchroom. So if that was the only place they posted it, it wouldn't affect all the employees there.

And we weren't asking them, as Your Honor pointed out, to put it at the rental counter.

THE COURT: It should be posted at the same location as are the EEO and the DFEH poster.

MS. DELLAVERSON: And that's in the employee lunchroom where the employee punch clock is.

THE COURT: Say again?

MS. DELLAVERSON: It's posted in the employee lunchroom where the time clock is.

THE COURT: How about "conspicuous places at employee check-in locations" if there are more than one?

MR. BEDECARRE: That will be fine, Your Honor.

THE COURT: (Writing.) "Employee check-in locations."

You're right. Thank you for bringing it to my attention.

MS. DELLAVERSON: And then the court's ordered that

Avis be permanently enjoined to follow the policy.

Again, policies change. Personnel policies change. It -- it's asked to have one policy that they can never change into perpetuity. Sounds a little bit Draconian or micromanagement.

THE COURT: If the State of California adopts a statute on ethnic - -

MS. DELLAVERSON: We were ordered to put the phone numbers in, for instance.

We're obviously not going to change that part of it. But - - the airport - - we set out specific people to complain to for instance. They may change all that.

THE COURT: How about "to publish this policy"? "Permanently enjoined to publish this policy"? They can publish it any way they like.

MS. DELLAVERSON: "This policy."

THE COURT: "This policy."

MS. DELLAVERSON: This policy has the phone numbers in it. The people in it, that could change. You may want to say - -

I don't think it lends itself to a permanent injunction on personnel policy.

MR. CURREY: Well, I think the way to get around that: Defendant Avis Rent-A-Car Systems shall be permanently enjoined to follow the form of this policy, not "the substance," "the form of this policy." And I think that permits the changing of phone numbers and people.

THE COURT: Why don't we say it that way, "the form of this policy, semicolon." Phone numbers, telephone numbers, and - -

MR. BEDECARRE: "Other administerial changes," something like that.

THE COURT: - - persons to whom to report to may change as circumstances alter.

MR. CURREY: That's fine; except, if the court's going to make those exceptions, I think it's important to say "enjoined to follow this policy except."

THE COURT: "Enjoined to follow the form of this policy. Telephone numbers and persons to report may change as circumstances alter."

MR. CURREY: That's fine.

THE COURT: Anything else?

MS. DELLAVERSON: Paragraph 17.

THE COURT: Yes?

MS. DELLAVERSON: The last sentence of that paragraph was unclear to me.

> Acknowledge receipt of this policy in writing, and records shall be maintained to show compliance with provisions of this injunction.

Is that referring to the receipt?

THE COURT: It refers to giving a receipt of the policy statement.

MS. DELLAVERSON: Keeping -- keeping records.

THE COURT: Keeping records.

MS. DELLAVERSON: Of the receipt.

THE COURT: Exactly.

So a manager can't say, "Well, I never heard of this policy."

All right. I'll tell you what I'm going to do: I've marked up this original. I'm going to hand it over to Mr. Currey and ask him to redo it with my notations, and submit it for signature. (Handing.)

Okay. Thank you very much.

MR. CURREY: Thank you, Your Honor.

THE COURT: Bye-bye. Court's adjourned.

---000---

STATE OF CALIFORNIA)
) SS.
CITY AND COUNTY OF SAN FRANCISCO)

I, KERY GILLET, Certified Shorthand Reporter, do hereby certify:

That I am the Reporter, duly appointed and sworn, who reported the above and foregoing proceedings at the time and place therein stated;

That I reported the said proceedings; and that the foregoing pages are a full, true, complete and correct transcript of my shorthand notes taken at said time and place to the best of my ability.

Dated: February 13, 1995

_____

Kery Gillet, CSR No. 3352

Official Court Reporter